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Fourth 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 2 (b)]

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Fourth 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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ABBREVIATIONS

IBRD	International Bank for Reconstruction and Development
IMF	International Monetary Fund

* * *

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

1. In his third report of 24 March 1970,¹ the Special Rapporteur prepared for the twenty-second session of the International Law Commission four draft articles with commentaries on succession to public property. There appear below some further draft articles, which the Special Rapporteur hereby submits for the twenty-third session. These articles, combined with the previous ones, might read, in their initial provisional form, as follows:

I. PRELIMINARY PROVISIONS

Article 1. Irregular acquisition of territory

1. Territorial changes which occur by force or through a violation of international law or of the Charter of the United Nations shall be without legal effect.

2. The State which commits an act of conquest or annexation shall not be deemed to be a successor State and, in particular, shall not acquire possession of the property of the predecessor State.

Article 2. Transfer of the territory and of public property as they exist

1. The predecessor State may transfer a territory only on the conditions upon which that State itself possesses it.

2. The successor State may not have possession of property of which the predecessor State itself had only precarious or irregular possession.

3. Public property shall be transferred as it exists and with its legal status, in so far as this is compatible with the municipal law of the successor State.

Article 3. Date of transfer of property

Save where sovereignty, having been terminated irregularly, has been restored and is deemed to be retroactive to the date of its termination, or where the date of transfer is, by treaty or otherwise, made dependent upon the fulfilment of a suspensive condition or simply upon the lapse of a fixed period of time, the date of transfer of public property shall be the date on which the change of sovereignty occurs *de jure*, through the ratification of devolution agreements, or is *effectively* carried out in cases where (a) no agreement exists or (b) reference is made in an agreement to the said effective date.

Article 4. Limitations by treaty on the transfer of public property

Subject to the application of general international law and of the law of treaties for the purposes of the interpretation or even the invalidation of an agreement regulating a case of State succession, any limitation imposed by treaty on the principle, hereinafter enunciated, of the general and gratuitous transfer of public property shall be interpreted strictly.

¹ Yearbook of the International Law Commission, 1970, vol. II, p. 131, document A/CN.4/226.

II. DEFINITION AND DETERMINATION OF PUBLIC PROPERTY

Article 5.² Definition and determination of public property

1. 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.

2. 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.

Article 5 bis³ (Variant to article 5)

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 transferred by that State.

III. GENERAL PRINCIPLE OF THE TRANSFER OF ALL PUBLIC PROPERTY

Article 6.⁴ Property appertaining to sovereignty

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

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

IV. INTANGIBLE PROPERTY AND RIGHTS

Article 7. Currency and the privilege of issue

1. The privilege of issue shall belong to the new sovereignty throughout the territory transferred.

2. Currency, gold and foreign exchange reserves, and, in general, monetary tokens of all kinds which are proper to the territory transferred shall pass to the successor State.

3. The apportionment of monetary reserves, in cases where there is more than one successor or in cases of dismemberment, shall be determined by treaty, regard being had in particular to the percentage of currency in circulation in that territory.

Article 8. Treasury and public funds

1. Public funds, liquid or invested, which are proper to the territory transferred shall pass to the successor State.

2. Upon closure of the public accounts relating to Treasury operations, the successor State shall receive the assets of the Treasury and shall assume responsibility for costs relating thereto and for budgetary and Treasury deficits. It shall also assume the liabilities on such terms and in accordance with such rules as apply to succession to the public debt.

² Formerly article 1 (see third report).

³ Formerly variant to article 1 (see third report).

⁴ Formerly article 2 (see third report).

Article 9. Public debt-claims

1. Irrespective of the type of succession, public debt-claims which are proper to the territory affected by the change of sovereignty shall remain in the patrimony of that territory.

2. The successor State shall, when the territorial change is effected, become the beneficiary of the public debts of all kinds receivable by the predecessor State by virtue of its sovereignty or its activity in the territory transferred.

Article 10. Rights in respect of the authority to grant concessions

Subject to the natural authority of the new sovereign to modify the pre-existing concessionary régime, and subject to such treatment as the successor State may intend to accord to concessions granted previously, that State shall be subrogated to the property rights which belonged to the predecessor State in its capacity as the conceding authority in respect of natural resources in the territory transferred and generally in respect of all public property covered by concessions.

V. PROPERTY OF THE STATE IN PUBLIC ENTERPRISES OR PUBLIC CORPORATIONS**Article 11. Public enterprises, establishments and corporations**

1. Public enterprises, establishments and corporations which belong entirely to the territory transferred shall not be affected *ipso jure* by the mere fact of the change of sovereignty.

2. Where, as a result of the territorial change, such public property is situated in parts of the territory falling within the jurisdiction of two or more different States, the said property shall be apportioned equitably between the said parts, due regard being had to the viability of the latter and to the geographical location and origin of the property, and subject, where necessary, to equalization payments and offset.

3. The successor State shall be automatically subrogated to the rights, and to the costs and obligations pertaining thereto, which the predecessor State possesses in public establishments, enterprises and corporations situated in the territory transferred.

4. Where there are two or more successor States, the said rights of the predecessor State shall be apportioned equitably between them in accordance with the criteria of geography, origin, viability and offset indicated in paragraph 2 above.

Article 12. Provincial and municipal property

1. The change of sovereignty shall leave intact the patrimonial property, rights and interests of the provinces and municipalities transferred, which shall be incorporated, in the same manner as the said provinces and municipalities themselves, in the juridical order of the successor State.

2. Where a change of sovereignty affecting a territory has the effect of dividing a province or a municipality by attaching its several parts to two or more successor States, the property, rights and interests of the territorial authority shall be apportioned equitably between the said parts, due regard being had to the viability of the latter and to the geographical location and origin of the property, and subject, where necessary, to equalization payments and offset.

3. The share of the predecessor State in the property, rights and interests of a province or a municipality shall pass *ipso jure* to the successor State.

4. Where there are two or more successor States, the said share of the predecessor State shall be apportioned equitably between them in accordance with the criteria of equity, location, origin, viability and offset indicated in article 11, paragraph 2.

VI. TREATMENT OF FOUNDATIONS**Article 13. Treatment of foundations**

In so far as the public policy of the successor State permits, the legal status of the property of religious, charitable or cultural foundations shall not be affected by the change of sovereignty.

VII. ARCHIVES AND PUBLIC LIBRARIES**Article 14.⁵ Archives and public libraries**

1. 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.

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

VIII. PROPERTY SITUATED OUTSIDE THE TERRITORY**Article 15.⁶ Property situated outside the territory**

1. 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.

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

Part Two**Draft articles with commentary**

2. Some of the draft articles the text of which is reproduced in part one of the present report have already been the subject of commentaries, to be found in the third report by the Special Rapporteur.⁷ Apart from a few additional observations as the occasion arises, the Special Rapporteur would request the members of the International Law Commission to refer primarily to his third report. The task now in hand is to make a presentation of the other draft articles.

3. In a number of respects, draft articles 1, 2, 3 and 4 ("Preliminary provisions") go beyond the strict confines of succession to public property. They touch on the entire question of State succession and thus invite, in particular, comment and embellishment by Sir Humphrey Waldock, Special Rapporteur for succession of States in respect of treaties.

⁵ Formerly article 7 (see third report).

⁶ Formerly article 8 (see third report).

⁷ *Yearbook of the International Law Commission, 1970*, vol. II, p. 131, document A/CN.4/226.

I. PRELIMINARY PROVISIONS

Article 1. Irregular acquisition of territory

1. Territorial changes which occur by force or through a violation of international law or of the Charter of the United Nations shall be without legal effect.

2. The State which commits an act of conquest or annexation shall not be deemed to be a successor State and, in particular, shall not acquire possession of the property of the predecessor State.

COMMENTARY

(1) The following will be discussed in turn below: (a) old forms of acquisition of territory; (b) law and practice under the League of Nations; (c) territorial changes and changes of sovereignty by force, in violation of the Charter of the United Nations and of the right of self-determination.

A. *Old, outdated or even prohibited forms of acquisition of territory*

(2) It is clear that some old forms of acquisition of territory are, if not prohibited, at least outdated in view of the evolution of international law.

(3) Even today, it is argued, there are still some lawful forms of acquisition of territory. The discovery and the effective and permanent occupation of territories which are without a ruler are still given space in even the most recent manuals and treaties on international law, having until quite recently provided grist for the decisions of international judicial bodies. The requirement that occupation should be effective and should be notified are still discussed on the basis of the General Act of Berlin (1885), despite the fact that this ancient monument of European diplomacy was binding only on the contracting parties, applied only to Africa, which today is almost entirely independent, and had already been partially abrogated by the Treaty of Saint-Germain-en-Laye of 1919, which relegated the notification system to the shadows. The notion of effectiveness was also for long a subject of dispute in international judicial bodies. All this belongs somewhat to the past, however, and the discussions are of only retrospective interest, since there is little likelihood of their being applied in practice in the world of today. To be more precise, the only present case in which recourse to a theory and form of acquisition of territory would not be nugatory—namely, the Arctic (which in any event is a sea and not a territory) and the Antarctic—shows how inadequate are these old notions, which were replaced by the theory of sectors and quadrants, and in particular by the principle of regulation by treaty.⁸

(4) Most writers regard cession as a form of acquisition of territory that is still valid in international law. Although it usually occurs by treaty, cession is also becoming very dated. Today, its validity is subject to a

⁸ See the Antarctic Treaty (1 December 1959) establishing a legal régime for the polar area (United Nations, *Treaty Series*, vol. 402, p. 71).

number of considerations which, it is generally agreed, render unlawful not only forced cessions of territory but also those which occur without consultation of the population, without the granting of a choice or option as regards nationality, without a guarantee of certain freedoms, and—most of all—in violation of the modern right of self-determination.

(5) This brings us back to the question of forced annexation and conquest. The evolution of international law in this area has been considerable. The judgement of the Permanent Court of International Justice sanctioning conquest, provided that there was a war,⁹ has become dated and somewhat fossilized since the international community began progressively outlawing war. Since the end of the nineteenth century, the various Pan-American Conferences and the charters of the States of the New World have, with increasing force and solemnity¹⁰ and with a faith worthy of pioneers breaking new ground for general international law, declared forced cessions of territories invalid.

B. *Law and practice under the League of Nations*

(6) The League of Nations, although somewhat timid, if not in its Covenant at least in the implementation of it, attempted to banish war and, as a consequence, forced territorial changes. The League did not lack either encouragements or, it must be admitted, disappointments.

(7) The Kellogg-Briand Pact, signed in Paris on 27 August 1928, proclaimed the renunciation of war as an instrument of national policy, although it did not provide for sanctions. The General Act for the pacific settlement of international disputes adopted by the League of Nations on 26 September 1928¹¹ made available to States voluntary procedures for the pacific settlement of international disputes. The doctrine of Secretary of State Stimson of the United States, as expressed on 7 January 1932 in a note to Japan, endorsed the banishment of war and added as a deterrent that the United States did not “intend to recognize any situation, treaty, or agreement which may be brought about by means contrary to the covenants and obligations of the Pact of Paris of August 27, 1928 [the Kellogg-Briand Pact]”.¹²

⁹ “Conquest only operates as a cause of loss of sovereignty when there is war between two States and by reason of the defeat of one of them sovereignty over territory passes from the loser to the victorious State” (*P.C.I.J.*, Series A/B, No. 53, p. 47).

¹⁰ Some noteworthy stages in this process were: the First International Conference of American States (Washington, 1889-1890); Fifth International Conference of American States (Santiago, 1923); Anti-war Treaty of Non-aggression and Conciliation (Rio de Janeiro, 1933), known as the Saavedra-Lamas Pact; the Charter of Bogotá (30 April 1948), article 17 of which provides that “no territorial acquisitions or special advantages obtained either by force or by other means of coercion shall be recognized *”, while article 5 (e) sums up the entire philosophy by laying down that “victory does not give rights *” (United Nations, *Treaty Series*, vol. 119, pp. 56 and 52).

¹¹ The General Act was later brought into line with the provisions of the United Nations Charter by General Assembly resolution 268 A (III), dated 28 April 1949.

¹² *American Journal of International Law*, Washington D.C., vol. 26, No. 2 (April 1932), p. 342.

(8) What this implied was the refusal to recognize any State or any territorial change created by an act of irregular force. Such an act occurred in the *Manchukuo* case. The Japanese attack of 18 September 1931 "to protect the safety and property of Japanese nationals established in Manchuria", the proclamation of 1 March 1932 declaring Manchuria's independence from China through the creation of the State of Manchukuo under a Japanese quasi-protectorate, and the Japanese-Manchurian raids on certain Chinese provinces early in 1933, caused the League of Nations to endorse the Stimson doctrine and, by an Assembly resolution of 24 February 1933, refuse to recognize Manchukuo and call for the withdrawal of Japanese troops. While the Council of the League did not go so far as to apply to Japan article 16 of the Covenant concerning sanctions against an aggressor, it asked States not to recognize the new State and not to accept as valid the passports, postage stamps and currency issued by Manchukuo.

(9) At the end of the Second World War the termination of Manchukuo's existence had *retroactive legal effect*, and the detachment of the Chinese province and transfers of property were considered null and void. The territory was regarded as never having passed out of China's sphere of jurisdiction.

(10) Similarly, after Italy had embarked on its expedition against the Empire of *Ethiopia* on 3 October 1935 (which it annexed by a Mussolinian decree of 9 May 1936) or occupied Albania on 7 and 8 April 1938 with the declared intention of annexing it, the relevant instruments signed at the end of the Second World War laid down that those irregular acts could have no legal existence and no legal consequences.

(11) The annexation of Ethiopia was not, of course, recognized—at least for some time—by a number of Powers, which drew the appropriate legal inferences from the fact that it had not been recognized and could not be relied on before the courts. For instance, Emperor Haile Selassie claimed from a cable and wireless company sums which it owed to him. The company having pleaded in defence that the debt owed to the Emperor in his sovereign capacity had passed into the patrimony of the Italian State which had succeeded the Ethiopian sovereign in respect of all public property, an English trial court ruled on 27 July 1938 that the United Kingdom's *de facto* recognition of the annexation on 21 December 1936 was not sufficient to effect the transfer to Italy of the property situated in England. However, as a result of the *de jure* recognition finally accorded by the United Kingdom on 16 November 1938, the English Court of Appeal took the view that the title to the property situated in England had passed to Italy.¹³

(12) It will be recalled that the same problem arose in the same terms before the French courts for Emperor Haile Selassie, who in his sovereign capacity was the holder of 8,000 shares of the Franco-Ethiopian Djibouti-Addis Ababa Railway Company.¹⁴

¹³ *Yearbook of the International Law Commission, 1970*, vol. II, p. 167, document A/CN.4/226, Part Two, commentary to article 8, paras. 30-31.

¹⁴ *Ibid.*, para. 32.

(13) However, after Ethiopia had recovered its sovereignty through the Treaty of Peace with Italy, the Ethiopian courts and international judicial bodies placed the irregular annexation of Ethiopia as it were in parentheses. For instance, the Franco-Italian Conciliation Commission ruled that Ethiopian sovereignty was retroactive to 3 October 1935, the date on which Italian troops had entered Ethiopia.¹⁵

(14) Similarly, the restoration of *Poland* after the First World War was the occasion for official policy statements to the effect that the various dismemberments suffered by Poland were entirely without legal effect. Poland took the view that it had recovered its sovereignty with retroactive effect.¹⁶

(15) This position is supported and expanded on by writers on the subjects of "*ius postliminii*" and "reversion to sovereignty".¹⁷

(16) The internal logic of the Nazi adventure, which began with the "question of Germans abroad" and the quest for living space ("*Lebensraum*"), required the policy of armed annexation. The *Anschluss* of Austria on 13 March 1938, the annexation on 30 September 1938 of the Sudetenland at the expense of Czechoslovakia, the permission given by the Third Reich to Hungary on 13 March 1938 to seize the Sub-Carpathian Ukraine, the occupation of Prague on 15 March 1939 and the proclamation of the German protectorate over Bohemia and Moravia, the occupation of the Territory of Memel on 22 March 1939, and the entire turmoil in the Danubian and Balkan regions of Europe—all these were carried out in an irregular manner, before being effaced by the allied victory in 1945. In order to drive home the principles, the Declaration of Berlin of 5 June 1945¹⁸ proclaimed that the occupation of German territory and the fact that the Third Reich Government no longer existed did not effect the annexation of Germany by the Allies.

¹⁵ Decision No. 201 adopted by the Commission on 16 March 1956 in case concerning the Franco-Ethiopian railway (United Nations, *Reports of International Arbitral Awards*, vol. XIII (United Nations publication, Sales No. 64.V.3), p. 648). For more details on this case and for other similar cases, see below, commentary to article 3, paras. 18 *et seq.*

¹⁶ For further details, see *Yearbook of the International Law Commission, 1970*, vol. II, p. 149, document A/CN.4/226, footnote 99; and below, commentary to article 3, paras. 18-22.

¹⁷ Cf. the writings of Ch. Alexandrowicz on legal history, and in particular the article "New and original states: The issue of reversion to sovereignty", *International Affairs*, London, vol. 45, No. 3 (July 1969), pp. 465-480; see also the interesting expositions of J. Brownlie in his *Principles of Public International Law* (Oxford, Oxford University Press, 1966), p. 152; S. C. Jain, "Reversion to sovereignty: An inquiry", *The Indian Journal of International Law*, New Delhi, vol. 9, No. 4 (October 1969), p. 525; A. I. S. Baddour: "Parallels between postliminium and state succession, with special reference to the cases of Algeria and Ethiopia", *Al-Qanoûn-wal-Iqtisâd*, Cairo, No. 2, 1963, pp. 131-147; M. Bedjaoui, *La révolution algérienne et le droit* (Brussels, International Association of Democratic Lawyers, 1961), *passim*.

Judge Moreno Quintana felt obliged to state in his dissenting opinion in the case concerning right of passage over Indian territory that "India, as the territorial successor, was not acquiring the territory for the first time, but was recovering an independence lost long since" (*I.C.J. Reports 1960*, p. 95).

¹⁸ Declaration regarding the defeat of Germany and the assumption of supreme authority with respect to Germany. United Nations, *Treaty Series*, vol. 68, p. 189.

C. Territorial changes and changes of sovereignty by force, in violation of the Charter of the United Nations and of the right of self-determination

(17) Nowadays, United Nations law is stricter in prohibiting the use of force. It is becoming obligatory to seek a peaceful settlement of disputes. Reference even to the Preamble of the Charter, which calls on the peoples of the United Nations to "live together in peace", "to unite [their] strength to maintain [. . .] peace" and "to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used", would seem to indicate that conquest cannot be recognized as having any validity. Above all, however, according to Article 1, the first purpose of the United Nations is to

maintain [. . .] peace [. . .] and to that end: to take [. . .] collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means [. . .] adjustment or settlement of [. . .] disputes or situations which might lead to a breach of the peace.

Preoccupied by this fundamental problem of the outlawing of war, the authors of the Charter did not shrink from repetition and thus, in paragraph 2 of the same article, declared themselves ready "to take other appropriate measures to strengthen universal peace". Similarly, under Article 2, paragraph 4, Members are obliged to

refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.

(18) As a result of the endeavours of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, the General Assembly adopted, on 24 October 1970, a Declaration on these principles, the text of which is annexed to its resolution 2625 (XXV). The first principle in the Declaration bears the following title:

The principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity of political independence of any State, or in any other manner inconsistent with the purposes of the United Nations.

The tenth paragraph of this principle provides that:

The territory of a State shall not be the object of military occupation resulting from the use of force in contravention of the provisions of the Charter. The territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognized as legal. Nothing in the foregoing shall be construed as affecting:*

(a) Provisions of the Charter or any international agreement prior to the Charter régime and valid under international law; or

(b) The powers of the Security Council under the Charter.

(19) Despite commendable efforts and encouraging progress, the *Special Committee on the Question of Defining Aggression* has, of course, not yet completed its work.¹⁹ However, the result of its endeavours can only be to strengthen the principles of the prohibition of the use

of armed force, the inviolability of a State's territorial integrity and the non-recognition of annexation. Aggression is a crime against the peace.

(20) The draft proposal made by the USSR in the Special Committee²⁰ contain the following provision (para. 4): "No territorial gains or special advantages resulting from armed aggression shall be recognized". Similarly, paragraph 8 of the draft proposal submitted by thirteen Powers (Colombia, Cyprus, Ecuador, Ghana, Guyana, Haiti, Iran, Madagascar, Mexico, Spain, Uganda, Uruguay and Yugoslavia)²¹ reads:

The territory of a State is inviolable and may not be the object, even temporarily, of military occupation or of other measures of force taken by another State on any grounds whatever, and that such territorial acquisitions obtained by force shall not be recognized.

The six-Power draft proposal (Australia, Canada, Italy, Japan, the United Kingdom of Great Britain and Northern Ireland and the United States of America)²² does not contain any similar provision on this particular point, simply on the ground that occupation and annexation are *consequences* of aggression and should not, therefore, be dealt with in a *definition* of aggression. However, the other Powers which submitted proposals take the view that military occupation and annexation are in themselves intrinsically acts of aggression.

(21) Writers on the subject agree that territorial changes which occur by force should not be recognized. The State which commits an act of conquest not only does not acquire possession of the property of the State against which the act is directed but, in a broader sense, cannot be deemed to be a successor State.²³

(22) Nowadays, and to an increasing extent, not only is war prohibited but any attendant territorial consequences benefiting the victor—*whether or not an aggressor*—are illegal. The forcible annexation of a territory following an act of aggression is invalid in international law; however, any acquisition of territory by annexation, even if it is the consequence of a victorious war by a State that was not originally the aggressor, must also be regarded as unlawful. In other words, quite apart from any question of the prohibition of war, the territorial annexation, even when it is the result of an act of self-defence, is regarded as unlawful in contemporary international law. Annexation is no longer a form of acquisition of territory to which the principles of State succession should apply.

(23) In the case of *Rhodesia*, the change of sovereignty took place in violation of the Charter of the United

¹⁹ *Ibid.*, Twenty-fifth Session, Supplement No. 19 (A/8019), annex I, sect. A.

²⁰ *Ibid.*, sect. B.

²¹ *Ibid.*, sect. C.

²² Cf. in particular 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; O. Debbasch, *L'occupation militaire: Pouvoirs reconnus aux forces armées hors de leur territoire national* (Institut des hautes études internationales de l'université de Paris, Bibliothèque de droit international, t. XVI) [Paris, Librairie générale de droit et de jurisprudence, 1962], pp. 17 *et seq.*, and *passim* (but note the approach adopted by the author, who speaks of military occupation in terms not only of an armed presence in enemy territory but also of the stationing of troops in friendly or allied territory).

¹⁹ For the most recent proceedings of the Committee, see *Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 19 (A/8419)*, and in particular the working paper submitted by Mexico (*Ibid.*, annex IV) and the report of the Working Group (*ibid.*, annex III).

Nations and of the right of self-determination, as a result of action by the European minority and the unilateral proclamation of Rhodesian "independence". On 12 November 1965, by resolution 216 (1965), the Security Council condemned the declaration of independence and called upon all States *not to recognize the régime in Southern Rhodesia*. Other Council resolutions recommended an embargo on petroleum products and military equipment, advocated the quelling of the white minority's rebellion, the severing of economic ties and the genuine implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, adopted by the General Assembly in 1960 [resolution 1514 (XV)], or decided that mandatory economic sanctions were to be applied.²⁴ So far, the measures taken by the Security Council under Article 41—and Chapter VII generally—of the Charter have been ineffective. What is certain, however, and what concerns us here, is that the white minority's declaration of independence runs counter to the right of peoples to self-determination and the principle of decolonization. The consequences of the change of sovereignty effected in violation of the Charter should not be legally enforceable. In particular, the Rhodesian Government should not be regarded as a successor. The Special Rapporteur does not know, however, whether control of Rhodesian public property, or at least of such property situated abroad and especially in the United Kingdom, has in fact passed to the Rhodesian Government.

(24) In many respects, *the secession of Katanga* and its establishment as a State, which was not recognized by the international community and was ephemeral, resembles the situation with regard to the State of Manchukuo. The attempt to bring about change and secession in order to deprive the Congo, the sole successor State to Belgium, of full possession of all its property and mineral resources was short-lived.

(25) *The attempted annexation of Namibia by the Republic of South Africa* is a violation of the Mandate, of the Charter and of the right of peoples to self-determination. The Union of South Africa did not and could not succeed Germany in Namibia when Germany renounced all its rights to what was known until 1968 as South West Africa. Under Article 22 of the Covenant of the League of Nations, the Union of South Africa assumed a Mandate over the Territory on behalf of the international community. As was stated by the International Court of Justice,²⁵ one of the "*principles [. . .] of paramount importance*" on which the Mandate was based was "*the principle of non-annexation*". The Court made it clear that

The terms of this Mandate, as well as the provisions of Article 22 of the Covenant and the principles embodied therein, show that the creation of this new international institution *did not involve any cession of territory or transfer of sovereignty* * to the Union of South Africa. The Union Government was to exercise an international function of administration on behalf of the League. . . .²⁶

²⁴ See in particular resolutions 232 (1966) of 16 December 1966, 253 (1968) of 29 May 1968, and 277 (1970) of 18 March 1970.

²⁵ Advisory opinion of 11 July 1950: "International Status of South West Africa", *I.C.J. Reports 1950*, p. 131.

²⁶ *Ibid.*, p. 132.

(26) Similarly, in a written statement submitted to the Court in 1970 pursuant to the request for an advisory opinion contained in Security Council resolution 284 (1970), adopted on 29 July 1970, the Secretary-General of the United Nations noted that

By assuming the responsibilities of the Mandatory Power, South Africa thereby accepted the premises on which the Mandate was founded and was thus precluded from claiming, at any future date, *any territorial or sovereign rights* * in respect of South West Africa inconsistent with the Mandate, or arising from events anteceding its creation.²⁷

(27) The Court had also stated that the nature of the Mandate was such that the international responsibilities assumed by South Africa were not dependent on the existence of the League of Nations and that the United Nations was justified in taking over the functions of supervision and control previously exercised by the League of Nations in respect of the Mandatory Power.²⁸ However, after many vicissitudes which need not be mentioned here,²⁹ the Republic of South Africa determined to shake off United Nations control of its actions and, to all intents and purposes, annexed the territory of Namibia. Yet the Court had clearly ruled that the consent of the United Nations was needed for any modification of the international status of South West Africa.³⁰

(28) The General Assembly of the United Nations had likewise always regarded the incorporation or annexation of Namibia as a violation of South Africa's international obligations.³¹ It had in vain requested the Mandatory Power not to create "territories" on an ethnic basis there

²⁷ I.C.J., Pleadings, Oral Arguments, Documents, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970)*, vol. I, *Request for Advisory Opinion, Documents, Written Statements*, The Hague, 1971 (Sales No. 356), pp. 211-212, para. 20.

²⁸ *I.C.J. Reports 1950*, p. 136.

²⁹ The whole case can be followed in the documents published by the Court (advisory opinions, judgements, memoranda and pleas): (1) International Status of South West Africa, advisory opinion of 11 July 1950, *I.C.J. Reports 1950*, pp. 128-219, and relevant memoranda and pleas; (2) Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa, advisory opinion of 7 June 1955, *I.C.J. Reports 1955*, pp. 67-123, and relevant memoranda and pleas; (3) Admissibility of Hearings of Petitioners by the Committee on South West Africa, advisory opinion of 1 June 1956, *I.C.J. Reports 1956*, pp. 23-71, and relevant memoranda and pleas; (4) South West Africa Cases, Preliminary Objections, judgement of 21 December 1962, *I.C.J. Reports 1962*, pp. 319-662, and relevant memoranda and pleas; (5) South West Africa Cases, judgement of 18 July 1966, *I.C.J. Reports 1966*, pp. 6-505, and relevant memoranda and pleas.

³⁰ "*The Union of South Africa acting alone has not the competence to modify the international status of the Territory of South-West Africa*" [. . .] the competence to determine and modify the international status of the Territory rests with the Union of South Africa acting with the consent of the United Nations" (advisory opinion of 11 July 1950, *I.C.J. Reports 1950*, p. 144).

³¹ Proposals for the incorporation of Namibia made by the Union of South Africa in a letter of 17 October 1946 from its legation at Washington to the Secretary-General of the United Nations (*Official Records of the General Assembly, Second part of First Session, Fourth Committee, part one, annex 13*); statement made on 4 November 1946 by the Prime Minister of South Africa to the Fourth Committee of the General Assembly (*ibid.*, annex 13a); General Assembly resolution 65 (I) of 14 December 1946 declining to accede to the incorporation of the Territory; cf. also resolution 2625 (XXV).

which would have led to the partitioning and gradual annexation of Namibia; that explained South Africa's policy of foreign immigration, which the General Assembly had condemned. Finally, the Assembly was forced to decide to terminate South Africa's Mandate [resolution 2145 (XXI) of 27 October 1966]. The Security Council (in the preambular paragraphs of its resolutions 245 (1968) and 246 (1968), but primarily and more explicitly in its resolution 264 (1969) of 20 March 1969) confirmed the resolution terminating the Mandate and ordered the recalcitrant Mandatory Power not to tamper with the integrity of Namibia.

(29) Having allowed the former South African administration time to withdraw from Namibia by 4 October 1969 [resolution 269 (1969) of 12 August 1969], the Council, noting South Africa's failure to comply with its instructions, as it had refused to comply with the very many earlier United Nations resolutions, declared South Africa's presence illegal, and called on States to break off economic relations with the former Mandatory Power [resolution 276 (1970) of 30 January 1970]. Finally, it decided [resolution 284 (1970) of 29 July 1970] to request the International Court of Justice for an advisory opinion on the question "What are the legal consequences for States of the continued presence of South Africa in Namibia, notwithstanding Security Council resolution 276 (1970)?" The Court's opinion is expected very shortly.³²

(30) One of the seven fundamental principles adopted by the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among

³² In the opinion of the Special Rapporteur, the Council, in requesting the Court's opinion, has not put to the Court the question whether or not the United Nations was competent to declare the Mandate terminated or asked it to state what are the legal nature and the force of Council resolution 276 (1970). The question that was put is quite different. The Court is asked merely to determine, for all States and for the international community, "the legal consequences [. . .] of the continued presence of South Africa" despite the Council's injunction in its resolution 276—in other words, *taking as the basic datum and starting-point that injunction and the illegality which it declared*. The Court is also requested—and this is a different but complementary and necessary task—to indicate to States and to the international community *legal ways and means* whereby those consequences may be given full effect. That should be the main purpose of the Court, which must determine the *so to speak operational*, legal consequences available whereby States may put an end to South Africa's continued presence. In other words, the Council's motive in first establishing South Africa's disqualification and the resulting and as yet unenforced legal consequences and then requesting an advisory opinion is to ensure that the legal situation which it, in conjunction with the Assembly, has created (and which the Court is not asked to inquire into) should no longer remain at variance with the factual situation. The Court is therefore merely requested, first, to determine the legal consequences of the situation, and, secondly, to indicate legal ways and means available under the Charter and under general international law whereby those consequences may no longer remain unenforced.

To the extent that it detracts from the direct responsibility assumed by the United Nations in Namibia until such time as the latter attains independence and that it impedes the exercise of this responsibility, South Africa's illegal presence results in a conflict *comparable to an act of aggression* committed by South Africa in a territory that is now within the exclusive jurisdiction of the United Nations.

Where the question of sanctions is concerned, this case is in many respects similar to that which confronted the League of Nations when Manchukuo was created.

States is the principle of equal rights and self-determination of peoples. As formulated by the Committee, this principle embodies the idea of the otherness of a colonial territory. Some important conclusions may be drawn from this.³³

(31) On 24 October 1970, the General Assembly incorporated the principle in question, without change, in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations [resolution 2625 (XXV), annex]. The sixth paragraph of the principle indicates that there can be no question of annexing a territory like that of Namibia which has

a status separate and distinct from the territory of the State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or Non-Self-Governing Territory have exercised their right of self-determination in accordance with the Charter. . . .

This is of prime importance both in itself and in relation to our concern about the draft article now under discussion. It is the mature expression of the right of self-determination and, even more, of a prior and imprescriptible right already irreversibly given substance by "otherness" (as Simone de Beauvoir would say)—by the unchangeably "other" and distinct nature of the territory in relation to that of the mandatory (or colonial) Power. This absolutely prohibits any annexation, i.e., any incorporation of one part into another from which it was and must remain distinct. The right of self-determination does not arise only in terms of the future, in connexion with the attainment of future independence; it also finds expression, as a prior right, in terms of the present, with a view to keeping a territory *distinct* from the territory administering it.

(32) It follows from this general analysis that the Republic of South Africa cannot be deemed to be a successor State in Namibia. Until the termination of the Mandate in 1966 it was a trustee for the international community. Now it is nothing more than a *de facto* administration whose presence is irregular. One of the essential elements of the right of self-determination is the principle of the permanent sovereignty of nations over their natural wealth and resources.³⁴ The Republic of South Africa's acquisition of the public property and natural wealth of Namibia is illegal and cannot find its justification in the principles of State succession.

(33) The case of *Palestine* is similar in some respects to those of Namibia and Rhodesia. In Palestine, as in

³³ One conclusion is that the long-vaunted principle that a colony forms an integral and inseparable part of the metropolitan territory is now demolished. It follows that there is less of a legal foundation than ever for any claim by a metropolitan country to exclusive jurisdiction in internal affairs, on the basis of Article 2, paragraph 7 of the Charter, as a ground for denying the competence of the United Nations in colonial matters. Moreover, where State succession is concerned, a proclaimed independence can no longer be analysed in terms of the secession or partial cession of a territory, since both of these presuppose a territorial oneness of the colony and the metropolitan country, and there is no longer any legal basis for this.

³⁴ General Assembly resolutions 1314 (XIII), 1515 (XV), 1803 (XVII), 2158 (XXI), 2200 A (XXI) and 2386 (XXIII).

Namibia, there was a Mandate which was entrusted to an administering Power and which strayed from its objective, namely, independence through the implementation of the right of peoples to self-determination, or, in other words, through "the right of the majority within a generally accepted political unit to the exercise of power . . .".³⁵ In Palestine, as in Rhodesia, a minority of the population seized power on the eve of the withdrawal of the administering Power.

(34) This commentary on draft article 1 will not go into the many legal questions raised by the Palestine affair.³⁶ Factually, what it consisted of was repeated annexations and repeated condemnations of the perpetrators by the Security Council. Thus, *after* the various Council resolutions (particularly resolution 1169, of 29 December 1948) calling upon Israeli troops advancing on the Gulf of Aqaba to evacuate occupied territories, and *after* the Egyptian-Israeli General Armistice Agreement signed at Rhodes on 24 February 1949, a cablegram dated 22 March 1949 from the United Nations Mediator to the President of the Security Council reported that Umm-Reshresh, known as Port Elat, on the Gulf of Aqaba, had been annexed by force. This rounded off another annexation, namely, that of the Negev. During the same period, from May 1948 to the signing of the Armistices, Israel went beyond what could have been allocated to it under the United Nations plan of partition. Part of Jerusalem was in fact annexed after the signing of the truce agreement of 30 November 1948 followed by the Armistice Agreement of 3 April 1949; by a decision of 22 December 1949, the Knesset made it the capital of Israel. The part of Jerusalem which had remained Arab was annexed after the June 1967 war by a Knesset decision of 27 June 1967. Permanent settlements are being established on the Golan Heights, and Sinai's natural resources, especially petroleum, are being exploited and concessions are being granted by an authority which acts as though it had sovereignty over the territory.

(35) Evidence of intent could be added to this factual evidence. To judge by certain official statements, Sharm el Sheikh, which has been occupied since 1967, will not be returned, nor is the West Bank of the Jordan ready to emerge from occupation-annexation. A map on the pediment of the Knesset shows Eretz Israel as extending from the Nile to the Euphrates.

(36) These successive aggrandizements add one more problem to the case of Palestine and raise in a serious form the question of the forcible annexation of territory, which is now prohibited more strongly than ever under international law. According to sound legal doctrine,

³⁵ This is the definition of self-determination, according to United Nations practice, given by R. Higgins (*The Development of International Law through the Political Organs of the United Nations* (London, Oxford University Press, 1963), p. 104).

³⁶ One question, for instance, is whether the very establishment of the Mandate was not in itself a violation of the Covenant of the League of Nations (cf. *Colloque de juristes arabes sur la Palestine: La question palestinienne, Alger, 22-27 July 1967* (Algiers, Les Presses I.M.J., 1968), pp. 72-84). Another question is whether the United Nations, and particularly the General Assembly, was competent to partition Palestine (*ibid.*, pp. 84-104).

military occupation following a war is essentially precarious in nature and can under no circumstances affect a State's sovereignty over that part of its territory which is occupied by foreign forces.

Article 2. Transfer of the territory and of public property as they exist

1. The predecessor State may transfer a territory only on the conditions upon which that State itself possesses it.

2. The successor State may not have possession of property of which the predecessor State itself had only precarious or irregular possession.

3. Public property shall be transferred as it exists and with its legal status, in so far as this is compatible with the municipal law of the successor State.

COMMENTARY

A. *The predecessor State may transfer a territory only on the conditions upon which that State itself possesses it*

(1) Article 2 of the Treaty of Turin of 24 March 1860, under which the King of Sardinia consented to the annexation of Savoy and the arrondissement of Nice (*circondario di Nizza*) to France, read as follows:

It is [. . .] understood that His Majesty the King of Sardinia cannot transfer the neutralized parts of Savoy except on the conditions upon which he himself possesses them, and that it will appertain to His Majesty the Emperor of the French to come to an understanding on this subject both with the Powers represented at the Congress of Vienna and with the Swiss Confederation and to give them the guarantees required by the stipulations referred to in this article.³⁷

(2) The Special Rapporteur was somewhat hesitant to submit this draft article to the International Law Commission. In the first place, it touches very extensively on the area entrusted to Sir Humphrey Waldock, Special Rapporteur for succession of States in respect of treaties. The question is to what extent, and under what conditions, the successor State is bound by various treaties which limited or circumscribed the sovereignty of the predecessor, and this is a matter with which Sir Humphrey is particularly concerned. The case cited related to the neutralized parts of Savoy. However, the wording used may give the impression that all restrictions on sovereignty which exist in the territory transferred must be accepted by the successor State, once the changes have taken place.

(3) Under articles 3 and 4 of the Treaty of 16 March 1816 between the King of Sardinia and the Canton of Geneva, the former agreed not to exercise jurisdiction in respect of customs duties within a certain area, known as the Sardinian area. When that area came under French sovereignty in 1860, it was agreed that the "servitude" should be assumed by France as the successor.

(4) However, in fact the problem raised here is not the automatic transmission of treaties of whatever kind, or

³⁷ G. F. de Martens, ed., *Nouveau Recueil général de traités* (Gottingen, Dieterich, 1860), t. XVI, part II, pp. 539-540.

even the transmission of those which establish various restrictions on sovereignty. *The transmission of such treaties to the successor does not appear to be the result of a peremptory rule of law arising out of the succession of States. It derives its origin and justification in each case from a convention, being the consequence of a special, express agreement concluded between the predecessor State and the successor State.*

(5) The same situation occurred when the German Empire, as the successor to France in Alsace-Lorraine in 1871, had to respect the obligations of the Treaty of Paris of 20 November 1815, which required France to dismantle the fortifications of Huningue and prohibited the construction of fortifications within an area of three leagues around Basel. When subsequently, in 1901, the German Empire planned to fortify Tuttlingen in the Grand Duchy of Baden, the answer given to Switzerland, which had become alarmed, was that the German Empire had undertaken to respect a servitude only with regard to the Basel area, and not Tuttlingen.

(6) The problem arose not long ago in connexion with the survival of the *capitulations régime*. Thus, when on 5 February 1885 Italy occupied Massawa, a territory of the Sublime Porte, alleging that Egypt had abandoned it, and when it imposed various taxes, some Governments, including that of France, invoked

the consular immunities and the privileges traditionally accorded [...] in countries under the *capitulations régime* to the subjects of European Governments and persons under their protection exempting them from all taxation.

Italy took the view, however, that the *capitulations*, which applied to the territory of the Ottoman Empire as a whole, were no longer necessary in a country under the administration of a Christian Power.³⁸

(7) In other cases, when changes of sovereignty occurred in Cyprus, in Bosnia and in Herzegovina, the *capitulations régime* was terminated by treaty—not, however, by agreement between the predecessor and the successor but as the result of a settlement between the successor sovereign and the States which were formerly the beneficiaries of such régimes. In other words, the *capitulations* were not, apparently, abolished *ipso jure* by the territorial change but by consent of the beneficiary Governments. In other situations which arose (Tunisia,³⁹ Bulgaria and Tripoli),

³⁸ Cf. the diplomatic correspondence quoted by A.-Ch. Kiss: *Répertoire de la pratique française en matière de droit international public* (Paris, C.N.R.S., 1966), t. II, pp. 312-318, and in particular the letter of 3 August 1888 from Mr. René Goblet, Minister for Foreign Affairs of France, to the French Chargé d'Affaires at Rome:

"We do not deny that Capitulations are no longer necessary in a country under the administration of a European Power. [...] If the conduct of the Italian Government in this matter should lead to the outright abolition of the Capitulations and of our pre-existing rights in Massawa, the only course open to us would be to take note of this new procedure and of the thenceforth established principle that the Capitulations automatically cease to exist, without any negotiation and without any agreement with countries where a European administration is established . . ."

(*ibid.*, pp. 315-316; and *Archives diplomatiques, 1889 (octobre, novembre, décembre)*, Paris, 2nd series, t. XXXII, p. 109).

³⁹ Although the protectorate did not, of course, make France a successor State.

the *capitulations régime* was deemed to continue automatically. However, the French Government in particular took the view on one occasion that

The entry into force of the Treaty of Lausanne will have the effect of formalizing Turkey's renunciation of its rights of sovereignty over Palestine and over Syria and Lebanon. Therefore any restrictions to which that sovereignty may have been subject become inoperative in relation to those territories.⁴⁰

(8) Thus, it will be noted that:

(a) The problem posed belongs more to the area of State succession in respect of treaties and its solution lies within the compass of Sir Humphrey Waldock's work;

(b) The problem has been settled in the past both by devolution agreements and by agreements between third States and successor States;

(c) Diplomatic practice in this area has been replete with contradictions and reversals;

(d) The *capitulations régime*, moreover, is in any event dying out completely⁴¹ and is of no interest today except as a historical and legal curiosity;

(e) Mention should be made here of "the vulnerability of treaty settlements which derogate from the common right of sovereignty", in the words of Professor Charles de Visscher.⁴² The limitation of sovereignty thus imposed on some countries really poses the problem in terms of *ius cogens*.

B. *The successor State may not have possession of property of which the predecessor State itself had only precarious or irregular possession*

(9) This proposition calls for the following commentaries:

(a) The principles of State succession do not have the effect of effacing any defects in the title of the predecessor State to property which it transfers to the successor State;

(b) The successor State does not possess more rights than the predecessor State over the property transferred;

(c) *A contrario*, what is transferred is property owned by the State, but *only* by the State. One must bear in mind the distinction between the property owned by public authorities in general (property belonging to provinces, municipalities and other territorial authorities and to public corporations) and State property in the strict sense.

⁴⁰ France, *Journal officiel de la République française, Débats parlementaires: Chambre des députés*, Paris, 9 January 1924, 12 legislature, No. 1, p. 4 (meeting of 8 January 1924: reply by the Minister for Foreign Affairs to a written question), quoted by A.-Ch. Kiss, *op. cit.*, p. 318.

⁴¹ The problem of *capitulations* was taken to the International Court of Justice on at least two occasions. The first case was removed from the Court's list (Case concerning the protection of French nationals and protected persons in Egypt, order of 29 March 1950, *I.C.J. Reports 1950*, p. 59). The *capitulations régime* in Egypt had been abrogated by the Convention of Montreux of 8 May 1937. The second was the Case concerning rights of nationals of the United States of America in Morocco (judgment of 27 August 1952, *I.C.J. Reports 1952*, p. 176). However, the independence of Morocco removed the last vestiges of the *capitulations régime* in 1956.

⁴² Ch. de Visscher, *Théories et réalités en droit international public*, 4th ed. (Paris, Pédone, 1970), p. 358.

1. Defects in title

(10) The Supreme Court of Poland took the view that the Polish Treasury could acquire title to property only if the property in question had belonged to the Russian Treasury in the territories ceded to Russia by Poland after the First World War. The Polish State could not benefit from any past confiscation measures which might have been imposed on Polish nationals. The owner of an estate situated in the part of Poland which was under Russian rule had his property confiscated because he had taken part in the Polish insurrection of 1863. The property was sold by the Russian State in 1874 at a nominal price. The Supreme Court of Poland held that the legislative and executive acts of the Russian Government, including the confiscations of 1863, had no legal basis and were "instances of simple violence".⁴³ The Polish State applied that principle in a situation where it would itself have been the beneficiary of the confiscation measures. The Court held that the Polish Treasury would be able to claim to have acquired the estate (whether *ipso jure* owing to the recovery of independence by Poland, or by virtue of the Peace Treaty with Russia) only if the estate had belonged to the Russian Treasury. But the property had never ceased to form the property of the person from whom it had been taken by the Russian authorities.⁴⁴

(11) In France, after the Restoration, confiscated property could be recovered if it had not been sold and had remained in the patrimony of the State. The French Act of 5 December 1814 laid down that the confiscated property of French *émigrés* who had left the country during the First Empire could not be considered the property of the Empire. The Empire had had only precarious possession of such property, according to the Act, which laid down that it must be returned. It followed that the Sardinian State, as successor to the French State under treaties which had retroceded Savoy to it, could not be considered to have possession of property of which the French State itself had only precarious possession.⁴⁵

(12) Although the successor State cannot have possession of property that was held irregularly by the predecessor State, it may, of course, regain full ownership of the property in its capacity not as a successor State but as an "original State" if the property was formerly in its patrimony and was confiscated following total or partial annexation of its territory.

2. Extent of the rights of the successor State over the property transferred

(13) The successor State does not require more rights than the predecessor State itself had over the property

⁴³ Kulakowski and others v. Szumkowski (A. D. McNair and H. Lauterpacht, ed., *Annual Digest of Public International Law Cases, 1927-1928* (London, 1931), Case N. 375, p. 551).

⁴⁴ Digest by the Secretariat of the decision of the Supreme Court of Poland in *Uszycka v. Polish State Treasury* (1930) [*Yearbook of the International Law Commission, 1963*, vol. II, p. 134, document A/CN.4/157, para. 350]. Cf. also *Lempicki and Morawska v. Polish Treasury* "[...] there has come about such a change in public and private law as to cause the revival of the rights and titles of the rightful owners of confiscated property" (*ibid.*, para. 352).

⁴⁵ France, Cour de cassation, Chambre des requêtes, Judgment of 13 July 1897, *De Chambost v. Royer-Collard*, *Journal de droit international privé*, Paris, t. 27, 1900, p. 780, summary.

transferred. This is a statement of the obvious, since no one, including a predecessor State, can "give more than he has". It is no less obvious, however, that public property, once it has been transferred, falls not only within the patrimony but also within the juridical order of the successor State; in other words, the latter henceforth has full disposal of it and has the power—subject to the observations in paragraphs 16 and 17 below—to maintain or to modify either its legal status or what constitutes public property.

3. State property and property owned by public authorities

(14) While the State is the public authority *par excellence*, it is not the only one. Public authority also finds expression at the provincial, district and municipal levels and through secondary territorial authorities generally, as well as through "public corporations", to quote the term used by Mrs. Suzanne Bastid to describe a variety of establishments or enterprises operated in the general interest. Although, according to the definition given in article 5 below, public property means all the property belonging to the State, to territorial authorities or to public bodies, it is only the share of public property which belongs to the State that is subject to general and gratuitous transfer to the successor State. The ownership of other public property is not affected by the change of sovereignty and it remains within the patrimony of the territorial authorities or public corporations, even though it too is property owned by public authority. What is transferable, therefore, is State property *stricto sensu*, and not *all* public property including everything owned by public authority in whatever form it finds expression. Such State property may be separate from the rest and be clearly identifiable, or it may be intermingled with other property belonging to public authority or even to individuals.

(15) Accordingly, the Special Rapporteur might long ago have proposed a more precise title for his study, such as "succession of States to State property" instead of "succession of States to public property". However, such an approach does not take account of the fact that the *patrimonial transfer of State property* is accompanied by the *substitution of the juridical order* of the successor as concerns the governance of all public property. In other words, the cessionary State succeeds to the State patrimony of its predecessor but at the same time it extends its municipal juridical order to other public property which does not enter into its patrimony. This is what the Special Rapporteur has tried to express in the draft articles. But does not this extension of the juridical order of the successor encounter immediately perceptible limits, once it is stated that property is to be transferred as it exists and with its legal status?

C. Transferability of property as it exists and with its legal status

(16) It seems self-evident that State property should be transferred as it exists, and in particular with its legal status. Thus, any debts, mortgages, and so on, with which the property ceded may be encumbered are generally not

affected by the change of sovereignty. There would seem to be little point in discussing at length a practice followed by the Third Reich, which automatically cancelled mortgages on immovable property to which it succeeded. Not only does such a practice seem to be questionable, but the Third Reich should not even be considered a successor State as the result of its various forced annexations.

(17) There is, however, another problem which is more to the point. It is the question of the compatibility of the legal status and existing characteristics of the property transferred with the rules of municipal law of the successor State. It may be that the latter's legislation does not provide for some legal institution which was perhaps peculiar to the legislation of the predecessor State. In such a case, it would seem that one could hardly fail to allow for that situation, which imposes objective limits on the transmissibility of State property as it exists.

This problem was also considered from another, complementary angle when the Special Rapporteur attempted an approach to the definition and determination of public property in his former draft article 1, which has become article 5 of the present draft.

Article 3. Date of transfer of property

Save where sovereignty, having been terminated irregularly, has been restored and is deemed to be retroactive to the date of its termination, or where the date of transfer is, by treaty or otherwise, made dependent upon the fulfilment of a suspensive condition or simply upon the lapse of a fixed period of time, the date of transfer of public property shall be the date on which the change of sovereignty occurs *de jure*, through the ratification of devolution agreements, or is effectively carried out in cases where (a) no agreement exists or (b) reference is made in an agreement to the said effective date.

COMMENTARY

(1) The date of transfer of property should normally be the same as the date of transfer of the territory itself. This means that the draft article submitted for the Commission's consideration goes beyond the strict confines of transmission of State property and concerns the broader problem of transfer of the territory itself. The draft is accordingly presented in provisional form, since it also pertains to the work of Sir Humphrey Waldock, Special Rapporteur for succession of States in respect of treaties.⁴⁶

(2) Very often, however, the date of transfer of property is not the same as the date of transfer of the territory but later, in fact if not legally. Except where a portion of territory is absorbed or annexed—which immediately terminates the former sovereignty—the transfer of all the

⁴⁶ Sir Humphrey referred to this problem, notably in his draft article 2, where, in the circumstances which he specifies, treaties are applicable "from the date of the succession" in a portion of territory passing from the sovereignty of one State to that of another (*Yearbook of the International Law Commission, 1969*, vol. II, p. 52, document A/CN.4/214 and Add.1 and 2).

property involved is carried out gradually as the details of the transfer are worked out in implementation agreements or the new sovereign effectively takes over, sector by sector, the public property which devolves to it.

(3) Moreover, the date of transfer of the territory is very often not the actual date laid down by agreement, but an earlier one. For instance, when a peace treaty is concluded, several dates are involved—the date of the armistice, truce or cease-fire, the date of signature of the peace treaty and the date of its ratification. The date of actual transfer of the property may in some cases be earlier than the date of the ratification which should give the operation full legal effect, and may be close to the time when possession is taken of the territories just after the armistice. Situations of this kind will not be dealt with here.

(4) The following will be discussed in turn below: (a) the problem of the date of transfer of the property in relation to the problem of determining what constitutes the property; (b) the fixing by treaty of the date of handing over the property; (c) the effectiveness of the transfer of the property, by treaty or otherwise; (d) cases of retroactive restoration of sovereignty; (e) the problem of transitional periods or "périodes suspectes".

A. Date of transfer and date of determination of what constitutes public property

(5) The case of the peace treaties that brought the First World War to an end is very well known and highly specific. First there was the date of ratification of these treaties, which delimited new political frontiers. Then there was the date by which the Reparation Commission set up under the treaties was to define the transferable public property and determine what it consisted of, thus clarifying the meaning and scope of the expression "all property, rights and interests" or "all goods and property" found in several articles of the peace treaties. In addition to determining what constituted the property, the Reparation Commission had also, of course, to assess it, and its value was to be deducted from the reparations which Germany was required to pay to the various Allied and Associated Powers. Although the Commission carried out the first task quite well on the whole, it never completed the second.⁴⁷

(6) It was not, of course, only from the day on which the Commission was able to determine the public character of a given property that it was declared to be transferable

⁴⁷ It will be remembered that, under the Treaty of Versailles, not only property belonging to public authorities (the State, provinces, municipalities, etc.) but also "public utility undertakings", in which the holdings of public authorities and those of private individuals were intermingled, were to be transferred by treaty. On the question of the determination of what constituted this property, see the proceedings of the Commission and the Case of German reparations: *Arbitral award concerning the interpretation of article 260 of the Treaty of Versailles* [arbitrator F. W. N. Beichmann], publication de la Commission des réparations, annex 2145a (Paris, 1924) and United Nations, *Reports of International Arbitral Awards*, vol. I, (United Nations publication, Sales No. 1948.V.2), pp. 429-528 (the second of the thirteen questions put to the arbitrator asked him to define the expression "entreprise d'utilité publique", or "public utility undertaking" (*ibid.*, pp. 453-468).

and was legally transferred to the cessionary State. In the case of the Treaty of Versailles, it was agreed, with irreproachable legal correctness, that the territories and public property were to be transferred as at the date of ratification of the Treaty, or, in other words, even before the Commission had determined precisely what constituted the property. The Commission, in drawing up the list—which it stated could not be exhaustive, but only declaratory—left the successor State free and entitled to consider itself possessed of the property designated by the Commission retroactively from the date of ratification of the Treaty. It was the change of sovereignty that led to the operation of determining what constituted the property, and not the latter that brought about *de jure* the transfer of the property.

(7) There is another aspect to the problem of determining what constitutes public property in relation to the date of transfer. It is the question both of rights arising in the future and of claims that are uncertain or not yet liquidated. This should not normally be a difficult problem. The successor State is the *de jure* holder of all the rights, existing or future, of the predecessor State. Therefore, even in the absence of a definite determination of what the property consists of, the cessionary State possesses the rights in it as from the date of transfer of the territory.

B. Fixing by treaty of the date of transfer of the property

1. De jure transfer

(8) Where no time is expressly laid down in an agreement, the transfer is legally effected as soon as the agreement enters into force by virtue of the law of treaties, i.e., generally from the date on which the instrument is ratified.⁴⁸ The date on which the Treaty of Versailles (1919) entered into force was 10 January 1920. This gave rise to many problems, including at least two which were brought before the Permanent Court of International Justice. The cessionary States sometimes took as their point of reference the date of the armistice (11 November 1918), sometimes the date of signature of the Treaty (28 June 1919), and sometimes, more correctly, the date on which the Treaty entered into force after exchange of the instruments of ratification. An account will be given below of the way in which the Permanent Court decided that the cession and occupation of the German territories which passed to Poland had become effective only on 10 January 1920.⁴⁹ The peace treaties of 10 February 1947 were to come into force upon deposit of ratifications by the parties in accordance with the provisions of those treaties.⁵⁰

⁴⁸ cf. the Vienna Convention on the Law of Treaties (*Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 289), and in particular articles 14 and 24.

⁴⁹ Settlers of German Origin in Polish Upper Silesia, Advisory Opinion of 10 September 1923, *P.C.I.J.*, Series B, No. 6.

⁵⁰ Treaty with Italy: article 90; Treaty with Romania: article 40; Treaty with Finland: article 36; Treaty with Bulgaria: article 38; Treaty with Hungary: article 42.

2. Transfer before ratification

(9) The Treaty of Versailles is decidedly an instrument containing a little of everything. Article 51 provided that

The territories which were ceded to Germany in accordance with the Preliminaries of Peace signed at Versailles on February 26 1871, and the Treaty of Frankfort of May 10 1871, are restored to French sovereignty as from the date of the Armistice of November 11 1918.*

Because the spirit and the letter of the text were so clear, the Permanent Court of International Justice was unable to extend the derogation concerning entry into force of the Treaty that was made in the case of France with regard to Alsace-Lorraine, which it had lost in 1871, to the case of Poland, which argued that it too was recovering under the same treaty, territories that had been lost at an earlier date.

(10) At this point mention may be made of a different but related problem, which has probably been glimpsed in connexion with draft article 2 commented on above. This is whether the successor State should simply receive the property as it exists on the date fixed by treaty (10 January 1920 in the case of Poland) or whether, although that is the effective date of transfer, it must be transferred as it existed (and with the composition and characteristics which it had) on 11 November 1918, the date of the armistice.

In other words, the problem is whether, once the principle that transfer is postponed until the date of ratification of the treaty is accepted, the successor State is nevertheless justified in assuming responsibility for the costs and claiming the profits relating to the property involved during the period, if not from armistice to ratification, at least from signature to ratification. The High Court of Poland and the Permanent Court of International Justice adopted different positions on this point. The latter took the date of ratification as its point of reference. The former held that the sale to a third party by the Prussian Treasury of property—namely, the German States' share in the capital of a private company—which should have reverted to Poland was invalid because the sale had taken place after 28 June 1919, the date of signature of the Treaty of Versailles, and because, the Polish Court ruled, *the property was to be transferred to Poland as it existed on 11 November 1918*, under the very terms of the Treaty and of the Armistice Convention.

(11) The foregoing should be read in conjunction with the commentaries on draft article 2 concerning the transfer of public property as it exists. The problems which arise in connexion with the date of recovery of debt-claims, especially taxes, as seen through the decisions of German, French and especially Czech courts will be discussed later.⁵¹

3. Transfers after a fixed period of time or by instalments

(12) When they occurred in the past, cessions of territories and property against payment became effective only after ratification of the treaty of cession and payment of the price by the acquiring State. It may be said that the date was established by agreement and depended both on

⁵¹ See below, commentary to article 9 (Public debt-claims).

the date of ratification of the agreement and on the fulfilment of a suspensive condition, namely, payment of the transfer price.⁵² One example will suffice. Under article 5 of the treaty of 4 August 1916 ceding to the United States of America the Danish West Indies, (St. Thomas, St. John, St. Croix and the adjacent islands and rocks), the purchaser agreed "to pay within ninety days from the date of the exchange of the ratifications [. . .] the sum of twenty-five million dollars in gold coin of the United States".⁵³ The agreement was ratified on 17 January 1917, and on 31 March 1917 the islands in question were effectively placed under the *imperium* of the United States, the transfer price having been paid to Denmark on that date.

(13) It will be noted that the commentary on the draft article concerning archives and public libraries⁵⁴ also contain some examples of the fixing of a time-limit by treaty for the transfer of such documents to the successor State.

(14) In some cases, devolution agreements impose a time-table of payments upon the successor State, notably for the transfer of public funds or assets which would normally be made on the date of transfer of the territory; this occurred, for instance, in the cases of India and Pakistan and of Syria and Lebanon. The Dominion of India was to succeed to the assets of the Reserve Bank of India, estimated at £1,160 million, only on the following terms: £65 million went into a "free" account, available immediately, and all the rest—the greater part—was placed in a blocked account, to be utilized according to a time-table. Again, Syria and Lebanon, upon becoming independent, were not allowed to dispose freely of assets; most of them were blocked and *were to be released progressively up to 1958*, subject to certain monetary and financial conditions.

4. Transfer of property dependent upon the fulfilment of a suspensive condition

(15) The transfer of the territory itself may be made dependent upon the fulfilment of a suspensive condition—for instance, consultation of the people, a referendum of the Guinean "no" or the Algerian "yes" type; and many plebiscites held after the First World War. Cession of the territory takes effect on the day of the popular consultation. The transfer of property must take place on that date unless—as is usually the case—there is an agreement laying down the arrangements for succession after referendum and fixing the date of the various transfers in some other manner (which brings us back to the cases considered previously).

⁵² Civil jurists do not regard payment of the price as a suspensive condition, but as an intimate part of—a "consideration" under—a synallagmatic contract.

⁵³ English text in *Supplement to the American Journal of International Law* (New York, Oxford University Press, 1917), vol. 11, p. 57; French text in *Revue générale de droit international public*, Paris, t. XXIV, 1917, p. 456, foot-note.

⁵⁴ See *Yearbook of the International Law Commission, 1970*, vol. II, pp. 160-161, document A/CN.4/226, Part Two, commentary to article 7, para. 45, and foot-note 184. See also article 14 below (in an addendum to the present report, to be published later).

5. Reference in a treaty to a date to be fixed subsequently by agreement

(16) Article 23, paragraph 3, of the Treaty of Peace with Italy of 10 February 1947 reads:

The final disposal of these possessions [i.e., Italy's territorial possessions in Africa] shall be determined jointly by the Governments of the Soviet Union, of the United Kingdom, of the United States of America and of France within one year from the coming into force of the present Treaty [. . .].⁵⁵

C. Effectiveness of the transfer

(17) When no agreement exists regarding the transfer of public property, the successor State is deemed to be the holder of the rights and interests attaching to such property with effect from the date on which the successor State actually takes possession of the property. Yet there have been cases in the past where the actual taking of possession was deemed to be an essential additional condition, even in the case of devolution by agreement. Thus, in the *case of the Fama*, which was heard in 1804, the British Admiralty High Court ruled that the taking of possession of Louisiana by France was necessary in order to consummate the Ildefonso cession agreement of 1796, failing which the purchase of the territory could have no legal effect.⁵⁶ However, this additional condition, which was interposed here by false analogy with the case of territories without a ruler, could not for long be maintained, since there is *ex hypothesi* no cession agreement in the case of territories without a ruler. Thus, on 24 March 1922, the Swiss Federal Council, as arbitrator in the *Case of the Colombian-Venezuelan Boundaries*, ruled that the taking of possession was not essential.⁵⁷ Accordingly, the date of transfer of public property must be fixed to coincide with the date of ratification of the cession agreement.

D. Cases where sovereignty is restored retroactively

1. Retroactive restoration of Ethiopian and Albanian sovereignty

(18) After the Treaty of Peace with Italy of 10 February 1947, Ethiopia recovered the independence it had lost in 1935. A dispute arose between France and Italy regarding liability for damages caused in Ethiopia during the war to nationals of the United Nations or their property. The Franco-Italian Conciliation Commission, which considered this case, held that it was incorrect to speak of the cession of the territory in 1947, since Ethiopian sovereignty was retroactive to 3 October 1935, the date on which Italian troops had entered Ethiopia.⁵⁸ The annexation of Ethiopia had been retroactively declared illegal in article 38 of the Treaty of Peace of 10 February 1947, as had the annexation of Albania in other provisions of the Treaty.

⁵⁵ United Nations, *Treaty Series*, vol. 49, p. 139.

⁵⁶ Ch. G. Fenwick, *Cases on International Law* (Chicago, Callaghan, 1935), pp. 494 *et seq.*

⁵⁷ United Nations, *Reports of International Arbitral Awards*, vol. I (United Nations publication, Sales No. 1948.V.2), p. 224.

⁵⁸ See foot-note 15 above.

The Franco-Italian Conciliation Commission referred to the

situation of Ethiopia and Albania, countries which had been completely occupied by Italy and whose sovereignty was restored retroactively [...]. It is probable that the choice was determined also by political motives, or in any event, by the susceptibility of Ethiopia, which did not wish to appear to be an annexing or cessionary State in respect of territory that it considered had never ceased to be its own, despite occupation and annexation which the Treaty declared retroactively to be illegal (article 38).⁵⁹

(19) Such positions in treaties, expressing disapproval of an act of annexation once the conscience of the world has reawakened, are not completely isolated. On the subject of India, for instance, Judge Moreno Quintana (in the *Case concerning right of passage over Indian territory*) stated in his dissenting opinion that "India, as the territorial successor, was not acquiring the territory for the first time, but was recovering an independence lost long since".⁶⁰

(20) Writers are beginning to concern themselves with these problems and, by extending their research and refining their analysis, are coming to perceive that there have been many cases for which no comprehensive and satisfactory explanation was found in traditional international law.⁶¹ The case of Poland may again be cited as an example.

2. The return of Poland to original sovereignty

(21) Poland, which in the course of history was four times partitioned among its neighbours, took the view, once it had regained its independence, that it had no predecessor. It strongly rejected the merest hint of an idea of succession. Its entry into possession of its public and private rights and of its property was considered by the Polish courts to be not the result of devolution to a successor but the expression of restored sovereignty. It was by "an act of its sovereign power" that it "recovered" its property and its rights. There had been no "transfer" and accordingly there was no need to seek to establish the date of the transfer. The property was considered never to have ceased to be subject to the exercise of Polish sovereignty.⁶²

(22) The Polish courts maintained those positions *urbi et orbi* with admirable perseverance and spirit, but in fact they gave rise to many practical problems which Poland was not always able to solve by maintaining irrevocably the choice which they implied. On occasions, it hedged its positions and, in proceedings before international judicial bodies, relied on cession treaties and transfer agreements. It is this that should be discussed next.

⁵⁹ United Nations, *Reports of International Arbitral Awards*, vol. XIII (United Nations publication, Sales No. 64.V.3), p. 657. (Translation from French).

⁶⁰ *I.C.J. Reports 1960*, p. 95.

⁶¹ Cf. the interesting expositions of Professor I. Brownlie (*op. cit.*, *loc. cit.*). See also the writings of Ch. Alexandrowicz on legal history, but in particular his article "New and original states: The issue of reversion to sovereignty" (*op. cit.*, *loc. cit.*). Cf. also S. C. Jain (*op. cit.*, *loc. cit.*), A. I. S. Baddour (*op. cit.*, *loc. cit.*), M. Bedjaoui (*op. cit.*, *loc. cit.*).

⁶² See *Yearbook of the International Law Commission, 1970*, vol. II, p. 138, document A/CN.4/226, and especially p. 149, foot-note 99.

E. "Decisive dates" and "périodes suspectes"

(23) A careful distinction must be made between two problems: the first relates to the date of effective taking of possession, or in other words, from Poland's standpoint, the date on which it recovered its lost property. This could coincide with any of the following four dates: The date of the armistice (11 November 1918), the date of signature of the Treaty of Versailles (28 June 1919), the date of ratification of the Treaty (10 January 1920), or the date on which Poland effectively regained possession of its property. For Poland, in the light of its municipal law, the date, whichever it might be, was of little importance because it took the view, in terms of its retroactively restored sovereignty, that the property in question had never ceased to be subject to the exercise of its sovereignty and that executive acts directed against it in the past were null and void, since they were instances of simple violence.

Logically, however—and here we come to the second problem—this should have led Poland to demand and to recover the property *with its original legal status and composition* and as it originally existed. That could not be done. In view of the practical impossibility, but at the cost of hedging its position, Poland therefore wanted the property to be "returned" to it at least as it was on the date of the armistice (11 November 1918) and not as it might have been composed on the date of entry into force of the peace treaty (10 January 1920). Poland wished to prevent the German States from taking advantage of the "période suspecte" between the armistice and the ratification of the Treaty of Versailles in order to carry out operations calculated to diminish the value and the extent of the property.

(24) The *Case of German settlers in Upper Silesia* came before the Permanent Court of International Justice. The information which the Polish Government submitted to the Council of the League of Nations and which was transmitted to the Court stated that the case involved a diminution of the immovable property of the State committed illegally by the German or Prussian Government through the sale of land and other State property situated in the territories that were ceded under the peace treaty.⁶³

The fact was that thousands of contracts of sale or leases concluded between the settlers and the predecessor State after the armistice and before the transfer had diminished the value of the State property which was to be ceded to the Polish Government.

(25) The *Prokuratorja generalna*, which represented the Polish Treasury in the litigation, had submitted observations to the Court in which it argued that

... any alienation or encumbrance of the public or private domain effected after the date of 11 November 1918 must be considered by the Allies to be null and void, particularly if, as was precisely the case with alienations of land in the settled areas, such transactions had not been essential to the normal functioning of the administration but had had a different purpose [...].⁶⁴

(26) The Court was of the opinion that

The position of the Polish Government is not justified. As the Prussian State retained and continued to exercise its administrative

⁶³ This is far removed from the theory of retroactive restoration of sovereignty; it is simply a question of *cession of territory by treaty*.

⁶⁴ *P.C.I.J.*, series C, No. 3, vol. III, p. 894.

and proprietary rights in the ceded territory until this territory passed to Poland under the Treaty of Peace, the only ground on which the position of Poland could be justified is, in the opinion of the Court, the contention that the granting of the *Rentengutsvertrag* was prohibited by the provision in the Spa Protocol, by which the German Government engaged, while the Armistice lasted, not to take any measure that could diminish the value of its domain, public or private, as a common pledge to the Allies for the recovery of reparations.⁶⁵

(27) The same opposing positions were taken by Poland and by the Court in the *Chorzow factory case*.⁶⁶ The Court held that

Article 256 of 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 sovereignty*.⁶⁷

It added:

Nor would it be legitimate to construe the Treaty of Versailles in such a way as to incorporate therein certain clauses of the Armistice Convention and of the instruments following it, so as to carry back to November 11th, 1918, the decisive date as from which rights acquired by individuals, under contracts concluded by them with the Reich and German States, should be regarded as void or liable to annulment.⁶⁸

Article 4. Limitations by treaty on the transfer of public property

Subject to the application of general international law and of the law of treaties for the purposes of the interpretation or even the invalidation of an agreement regulating a case of State succession, any limitation imposed by treaty on the principle, hereinafter enunciated, of the general and gratuitous transfer of public property shall be interpreted strictly.

NOTE. For the commentary to draft article 4, the Special Rapporteur would refer the Commission to the future addendum to the present report.

II. DEFINITION AND DETERMINATION OF PUBLIC PROPERTY

Article 5.⁶⁹ Definition and determination of public property

1. 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.

2. 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.

⁶⁵ *Ibid.*, Series B, No. 6, pp. 42-43.

⁶⁶ For the circumstances of the case and references, see *Yearbook of the International Law Commission, 1970*, vol. II, pp. 141-142, document A/CN.4/226, commentary to article 1, paras. 37-42.

⁶⁷ *P.C.I.J.*, Series A, No. 7, p. 29.

⁶⁸ *Ibid.*, p. 30.

⁶⁹ Formerly article 1.

Article 5 bis⁷⁰ (Variant to article 5)

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 transferred by that State.

COMMENTARY

(1) The Special Rapporteur draws the Commission's attention to his third report⁷¹ containing his commentaries on draft article 1, which becomes article 5 in the present numbering. He submits below some additional observations which are centred on the following five points: (a) the notion of "public property" and that of "transferable public property"; (b) the definition of territorial authorities and public bodies; (c) the determination of what constitutes public property; (d) the distinction between *rights* and *interests*; (e) the transferability of unliquidated rights.

A. *Is property transferred or placed under the jurisdiction of the new juridical order?*

(2) As indicated above,⁷² not *all* public property is transferable. The proposed definition is solely intended as an attempt to indicate what constitutes public property. It is another matter to determine whether all public property covered by this definition is transferable. This is a problem which was already mentioned in the Special Rapporteur's first report.⁷³

(3) Where State succession is concerned, only public property belonging to the State appears to be susceptible of transfer from the patrimony of the predecessor State to that of the successor State. Other public property constituting the patrimony of provinces, municipalities or public enterprises retains its juridical status, i.e. is not generally the object of a transfer to the successor State, but falls under the juridical system of that State. In other words, the juridical order of the successor State will henceforth also govern the public property of territorial authorities other than the State or its public bodies. Furthermore, not *all* the property of the State is automatically transferable. The question whether property in the "private domain" of the State is transferable on the same grounds as property in its "public domain" is still being debated by the learned authorities. The Special Rapporteur, for his part, has specified that the transfer will affect all property appertaining to sovereignty. This formulation goes beyond the problem of the distinction between the public and private domain of the State. But it remains to be established whether it does not also at the same time and in a certain sense go beyond the distinction between

⁷⁰ Formerly variant to article 1.

⁷¹ *Yearbook of the International Law Commission, 1970*, vol. II, p. 131, document A/CN.4/226.

⁷² See above, commentary to article 2, paras. 14-15.

⁷³ *Yearbook of the International Law Commission, 1968*, vol. II, p. 107, document A/CN.4/204, paras. 87-90.

State property in particular and public property in general. The property of a *public authority* may be that of the State, but it may also be that of a territorial authority other than the State. The Special Rapporteur is at present not entirely certain that some property appertaining to sovereignty does not also include property of public authorities other than the State.

(4) It should also be noted that some ambiguity is introduced into these matters by certain agreements and court decisions. For example, the Franco-Italian Conciliation Commission established under the Treaty of Peace with Italy of 10 February 1947 regarded itself as bound by the very specific wording of paragraph 1 of annex XIV to the Treaty,⁷⁴ and recognized the devolution to the *successor State*, in full ownership, of State property and also of para-statal property, including municipal property.⁷⁵

(5) One question not mentioned in the third report but touched upon in the second⁷⁶ is the nature of the property of *chartered companies*. Such companies were granted some of the powers of sovereignty in the colonies by the metropolitan State and by virtue of those powers administered property the nature of which is not easy to define. The British South Africa Company, created by a Charter granted by Queen Victoria on 29 October 1889, had the power, in what has now become Zambia and Rhodesia, to conclude treaties and promulgate laws. In that area the company was *the public and administrative authority par excellence*. Thus a *private* company disposed of *public property*, behaving as its owner and granting concessions to other companies from which it collected royalties in the same way as a State.

B. Definition of territorial authorities and public bodies

(6) The definition of the territorial authority (province, municipality, district, canton, etc.) is normally a matter of internal public law. As the authority is not a subject of international law, there is no definition of it that is proper to that law. International lawyers have, however, concerned themselves with the definition of an authority such as a municipality. In particular, they had occasion to do so when an attempt was made in article 56 of the Hague Convention of 18 October 1907, revising the Convention of 1899, to provide for a system of protection of public property, including that of municipalities, in time of war. They then turned their attention to both the notion of public property and the definition of a municipality.⁷⁷ Writers have, in fact, adopted a rather more detailed

⁷⁴ United Nations, *Treaty Series*, vol. 49, p. 225.

⁷⁵ 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). See *Yearbook of the International Law Commission*, 1970, vol. II, p. 151, document A/CN.4/226, Part Two, commentary to article 2, paras. 32-34.

⁷⁶ *Ibid.*, 1969, vol. II, p. 92, document A/CN.4/216/Rev.1, para. 114 and foot-note 97.

⁷⁷ See O. Debbasch (*op. cit.*), pp. 29-30, and foot-notes 34 and 35) citing a number of authors.

approach to the definition of public property in the context of the law of war than in that of State succession.

(7) With regard to public bodies or, as they have been termed, corporations of public law, an approach and a definition will be attempted in the context of draft article 11.

C. Determination of public property

(8) The Special Rapporteur draws the Commission's attention to recent illuminating comments on this problem by Professor Daniel Bardonnet,⁷⁸ and would refer in particular to a case arising out of the work of the Reparation Commission established by the peace treaties of 1919. The Reparation Commission decided that it did not have the power to interpret article 256 in relation either to Germany or to the cessionary Powers. Consequently, in the event of a dispute arising between Germany and a cessionary Power with respect to a given property, *the Commission was not required to intervene. The dispute could be settled by agreement between the countries concerned; but the cessionary Power could also, by virtue of its rights of sovereignty over the territory ceded, settle any question relating to the ownership of the said property by a decision of its competent authorities.*⁷⁹

(9) The Reparation Commission does not always seem to have taken a consistent position. Thus, on occasions it (a) itself proceeded to the determination of the public nature of a given property before assessing its value; (b) contributed to the definition of public property given by an arbitration body;⁸⁰ (c) invited the countries concerned, as in the above-mentioned case, to arrive at an agreed determination of public property, and (d) recognized that the successor State has the power to take a sovereign decision on the question. This last position should be compared with the Special Rapporteur's comments in his third report on the subject of recourse to the law of the successor State for the purpose of determining what constitutes public property.⁸¹

(10) It should be noted that there was an internationalist approach to the determination of public property within the Reparation Commission itself. Thus a *Committee of Three Jurists* was established, appointed and instructed by the Commission,⁸² acting under article 195 of the Treaty of Saint-Germain-en-Laye.⁸³ The Committee dealt with a

⁷⁸ D. Bardonnet, *La succession d'Etats à Madagascar (succession aux droits conventionnels et aux droits patrimoniaux)* (Paris, Librairie générale de droit et de jurisprudence, 1970), Bibliothèque de droit international, t. LVII, pp. 153-206.

⁷⁹ *Résolutions de la Commission des réparations*, decision No. 708, record No. 106. Text reproduced in *Traité de Versailles: Clauses de réparations annotées au 31 mars 1925* (Paris, Imprimerie officielle, 1925), p. 156.

⁸⁰ cf. the arbitral award by Beichmann cited above (see foot-note 47 above).

⁸¹ See *Yearbook of the International Law Commission*, 1970, vol. II, pp. 137 *et seq.*, document A/CN.4/226, Part Two, commentary to article 1, paras. 17-46.

⁸² Decision No. 901 of the Reparation Commission. The Committee consisted of Mr. Hugh A. Bayne, Mr. J. Fischer-Williams, and Mr. Jacques Lyon.

⁸³ G. F. de Martens, ed., *Nouveau Recueil général de traités* (Leipzig, Weicher, 1923), 3rd series, t. XI, pp. 754-755. For English text, see F. L. Israeli, *Major Peace Treaties of Modern History, 1648-1967* (New York, Chelsea House Publishers in association with McGraw-Hill, 1967), p. 1620.

number of cases, including that known as the Triptych of St. Ildefonse (concerning a series of paintings by Rubens) and that of the Treasure of the Order of the Golden Fleece. Belgium had requested Austria to restore these items, claiming that they had been transferred to Vienna "a violation of the rights of the Catholic Low Countries to which Belgium has succeeded". The Belgian case rested on the fact that these works of art had previously been acquired for valuable consideration and that the purchase could therefore only have been on behalf of the State or of the "Belgian public domain". The Committee of Three Jurists rejected the Belgian claim, taking the view that neither the Rubens Triptych nor the Treasure of the Order of the Golden Fleece formed part of the public domain of the predecessor State, but "an integral part of the private settled property of the Habsburg family".*⁸⁴

(11) This is not the place to discuss the soundness of the opinion of the Committee of Three Jurists or the validity of the distinction between the public and private domain of the State. For the moment, the case is mentioned simply as an example of a procedure for the determination of public property. But in such cases neither the Reparation Commission nor the Committee of Three Jurists which it appointed were in a position to carry out their task without reference to the municipal law of the predecessor State. But recourse to this municipal law has limits that are examined at length in the third report.⁸⁵ The obscurities or even inconsistencies in the national legislation of the predecessor State, the reluctance of the cessionary State to inherit rules concerning State property previously established by a despotic ruler or potentate and, even more, the temptation that assails every conqueror to change the régime of public property in order to grant concessions to an immigrant population in a colony or to attain some other political aim, the existence of charges on public property regarded as too heavy by the successor State—all these are additional factors discouraging recourse to the legislation of the predecessor State for the purpose determining what constitutes public property.

In this connexion we refer again to the study by Bardonnnet, who writes as follows:

Judicial practice [in France], which is favourable to the development of private property, has sought to demonstrate that the theory of succession to the rights of local sovereigns was false. Not only did the illegitimate character of these rights rule out the possibility of their being claimed by a successor in good faith [. . .], but the conquering State was competent to change local customs and to substitute its own legislation, or at least to retain only such part of the traditional law as was compatible with its civilizing mission and with international law. The argument of under-development was,

⁸⁴ Reparation Commission, annex No. 1141, *Belgian claims to the Triptych of St. Ildefonse and the Treasure of the Order of the Golden Fleece: Report by the Committee of Three Jurists (Confidential)*, Paris 1921. Initially, the Reparation Commission itself was to have ruled on the disposal of these works of art; for that purpose it sought the opinion of the Committee provided for in article 195 of the Treaty of Saint-Germain-en-Laye, which required that body to examine the conditions under which the objects or manuscripts in possession of Austria had been carried off by the House of Habsburg and by the other Houses that had reigned in Italy.

⁸⁵ See foot-note 81 above.

surprisingly, invoked against the successor State itself as being too faithful a reflexion of the predecessor State.⁸⁶

(12) These comments on the limits to the application of local law link up with the Special Rapporteur's observations above on draft article 1 (irregular acquisition of property or territory), and more particularly, on paragraph 2 of draft article 2 (property of which the preceding sovereign had only precarious or irregular possession). The transfer in principle of the patrimonial rights of the predecessor State to the successor State implies that the rights concerned are not contested. Property acquired improperly by the former does not pass to the latter. This also implies the converse, namely, that all improper appropriation by the successor State is null and void.⁸⁷

D. Distinction between rights and interests

(13) The proposed definition of public property refers to *rights and interests*. Although the notion of rights—real, patrimonial, pecuniary—is well-known to the law, that of interests is more intangible. So far as the Special Rapporteur is aware, there is no definition of "interests" as precise as that which could be given of "rights", the former term probably having a political rather than a legal connotation. The *Dictionnaire de la terminologie du droit international* defines "interest" as a

term denoting that which materially or morally concerns a natural or juridical person, the material or moral advantage presented for such a person by an act or an abstention from an act, by the maintenance of or alteration in a situation.⁸⁸

⁸⁶ D. Bardonnnet, *op. cit.*, pp. 151-152, and *passim*. In these various cases local legislation was set aside, not in order to ensure to the successor State a wider succession to public property, but to enable it to extend the domain of private property for the benefit of its own citizens. Bardonnnet cites (*ibid.*, pp. 151 and 152, foot-notes 53 and 54) the decision of the Court of Appeal of French West Africa of 10 March 1933 (*Etat français v. Jao Juventio d'Almeida, Recueil Daresté*, 1933, court decisions, pp. 87-88) according to which

"The French State [. . .] cannot claim the transfer to its patrimony of anything that is merely the product of violence, spoliation and abuse [on the part of a] barbaric and tyrannous chief of a native tribe [. . .] and the French State cannot claim these rights as the source of its own."

The same author refers to the

"famous words used by Napoleon III in a letter to Marshal Pélissier of 6 February 1863, when a similar problem had arisen in Algeria and the French State had abandoned its right of eminent domain over the *arch* lands (*senatus consultum* of 22 April 1863): "What then, would the State invoke the despotic rights of the Grand Turk?" (*ibid.*, p. 152, foot-note 54).

According to this same decision of the Court of Appeal of French West Africa of 10 March 1933 cited by Bardonnnet, the fallacy of the succession theory

"arises from the significance attached to the effects of conquest [. . .] [The latter] is not a normal means of transmitting rights, embodied in the laws of a civilized country, [. . .] the codes ignore this method of acquisition by force; [. . .] the effects of conquest are not governed by any rules; [. . .] they depend on the will of the conqueror as much as on the facts of the situation, and conquest either creates no rights or creates them all, as the case may be; [. . .] conquest does not have the consequence of authorizing the victorious State to perpetuate itself in the abuses of a conquered native chief [. . .]" (*ibid.*, p. 152, foot-note 55).

⁸⁷ cf. D. Bardonnnet, *op. cit.*, pp. 176 *et seq.*, and *passim.*, in particular on the *Résidence générale de Madagascar* Case.

⁸⁸ *Dictionnaire de la terminologie du droit international*, ed. Jules Basdevant (Paris, Sirey, 1960), p. 342.

The Special Rapporteur has nevertheless used this term, despite its imprecision, in the definition he has proposed for public property. His sole reason, which he recognizes as insufficient, is that the term is used in a very large number of diplomatic agreements and texts. To take only one example, the Treaty of Versailles of 28 June 1919 includes a separate section (section IV of part X) entitled "Property, rights and interests".⁸⁹

E. *Unliquidated claims and rights*

(14) A special aspect of the problem of determining what constitutes transferable public property is presented by the question of unliquidated claims and rights. Some of the theorists take the view that such claims can hardly be considered as "public property" capable of transfer to the successor State.⁹⁰ Their argument is that such claims are vested in the predecessor State, for whose benefit they were established, and that, in the absence of a continuing legal relationship between the author of the damage suffered and the predecessor State—a relationship that would not survive the change of sovereignty—the successor State cannot become the creditor.

There is admittedly no legal link between the predecessor State and its successor nor any direct link between the new sovereign and the third party responsible for the damage. But in this matter—which properly belongs to the sphere of international responsibility rather than to that of State succession—there is a substitution of relationships. The damage suffered, if real, is not indeterminate; it has left some trace, or at least, if it is considered fair that there should be compensation, it has affected the exercise of sovereignty in one way or another or resulted in a more or less serious disturbance of some juridical, economic or social order attached to the territory transferred. Furthermore, the recognition or non-recognition of a right, which has been legally established but not yet liquidated, should not depend on the moment or period at which it is claimed. If the claim had been settled before the change of sovereignty, its product, either in its original form or re-used, would have in some way enriched the territory. This problem is of some practical importance, since it also affects outstanding debt-claims, particularly in respect of taxes.

III. GENERAL PRINCIPLE OF THE TRANSFER OF ALL PUBLIC PROPERTY

*Article 6.*⁹¹ *Property appertaining to sovereignty*

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

⁸⁹ G. F. de Martens, *Nouveau Recueil général de traités* (Leipzig, Weicher, 1923), 3rd series, t. XI, p. 323.

⁹⁰ Ch. Rousseau, "Les transformations territoriales des Etats et leurs conséquences juridiques", *Cours de droit international public* (Paris, Les cours de droit, 1964-1965), pp. 142-143.

⁹¹ Formerly article 2.

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

COMMENTARY

(1) The Special Rapporteur's main observations are to be found in his commentaries on the draft article in his third report.⁹² The general principle of the transferability of public property appertaining to sovereignty is recognized.⁹³ The reference here is to property allocated by the State to a public service or public utility, these two terms being interpreted in a broad sense. There are only a few brief comments to add.

(2) The problem of substance does not in fact seem to be that of transfer, which is held to be mandatory by the majority of writers and to be possible subject to certain conditions by a minority, but rather whether the transfer of all public property, including that in the private domain, should be without compensation or against payment. In other words, while the transfer without compensation of property appertaining to the public domain is not in dispute, some legal authorities maintain that public property constituting the private domain can be transferred only against payment.⁹⁴ It is probably because of this problem that writers still support the distinction between the public domain and the private domain, despite the fact that it is not common to all systems of municipal law and has partly disappeared from diplomatic practice and international jurisprudence.

(3) As indicated in the third report, contradictory solutions have been adopted at different times and in different places. Further examples can be given to illustrate this point. Although, as mentioned above, the Committee of Three Jurists saw fit to retain the distinction between the public domain and the private domain in the case of the Triptych of St. Ildephonse (a work by Rubens) and in that of the Treasure of the Order of the Golden Fleece,⁹⁵ the Permanent Court of International Justice found elsewhere⁹⁶ that the "alleged public or private character [of property] is of no account" and that "the distinction between public and private property [...] is neither recognized nor applied by the Treaty of Trianon". Thus, according to the Court, the settlement treaties relating to the Austro-Hungarian monarchy—the Treaty of Saint-Germain-en-Laye and the Treaty of Trianon—do not take the public or private character of property as the criterion for its transfer. Yet at virtually the same moment the Committee of Three Jurists rendered a contrary opinion,

⁹² *Yearbook of the International Law Commission, 1970*, vol. II, pp. 143 *et seq.*, document A/CN.4/226, Part Two, commentary to article 2.

⁹³ See D. Bardonnet, *op. cit.*, pp. 567 *et seq.*, and copious footnotes.

⁹⁴ See the Special Rapporteur's first report (*Yearbook of the International Law Commission, 1968*, vol. II, pp. 106-107, document A/CN.4/204, paras. 79-86), the second report (*ibid.*, 1969, vol. II, p. 69, document A/CN.4/216/Rev.1), and the third report (*ibid.*, 1970, vol. II, pp. 149-150, document A/CN.4/226, Part Two, commentary to article 2, paras. 24-27).

⁹⁵ See above, commentary to article 5, para. 10.

⁹⁶ *P.C.I.J.*, Series A/B, No. 61, pp. 238 and 237.

at least so far as the Treaty of Saint-Germain is concerned. Such ambiguities and contradictions include the provisions of article 56, third paragraph, of the Treaty of Versailles, which destroys the distinction made, since it stipulates that "Crown property and the property of the former Emperor or other German sovereigns shall be assimilated to property of the public domain".⁹⁷

(4) A more direct approach to the question of whether property should be transferred without compensation was taken by the Financial Committee set up under the Reparations Commission. After protracted and difficult discussions, it decided, by majority vote, in favour of the principle of transfer without compensation. The Supreme Council nevertheless decided otherwise, although it made an exception in two cases—Belgium and Alsace-Lorraine—which were deemed to be territories restored to their original sovereign.

The Special Rapporteur has sought to escape from this distinction between the public and the private domain, which has been a source of difficulty and confusion. He has accordingly proposed that the transfer of property appertaining to sovereignty without compensation should be deemed to be the rule. There may perhaps be other property which, though not appertaining to sovereignty, belongs to the public domain and as such should also normally be transferred without compensation. If that proves to be the case, the matter could be dealt with in the context of other draft articles.

IV. INTANGIBLE PROPERTY AND RIGHTS

INTRODUCTORY COMMENTARY

A. "Jus imperii" and "jus gestionis"

(1) Articles 7, 8, 9 and 10 to some extent represent the *lex specialis* as opposed to the *lex generalis* laid down in article 6.

(2) Bluntschli at one time proclaimed the rule that "the property" of States which have ceased to exist passes, actively or passively, to the successors of such States".⁹⁸ In another rule he dealt with the question of "public treasuries", which he apportioned among several successors in proportion to population because "it is necessary to go back to the fundamental element of the State, i.e. man, in order to find an equitable and reasonable solution".⁹⁹ The writer used the term "property" in the broad sense which was given to it at the time and which covered "private property belonging to the Treasury, for example, some industries, some land, and cash".¹⁰⁰

(3) Today, the Treasury, public funds, the currency, State bank deposits, gold reserves of the institution of issue, public debt-claims, tax revenue, State resources,

⁹⁷ D. Bardonnet, *op. cit.*, p. 142 and foot-notes. See also articles 120 and 257, third paragraph, of the Treaty of Versailles.

⁹⁸ J.-K. Bluntschli, *Le Droit international codifié*, 5th ed. rev. and enl., tr. from the German by M. C. Lardy (Paris, Alcan, 1895), p. 85 (rule 54).

⁹⁹ *Ibid.*, p. 87 (rule 58), commentary to rule 58.

¹⁰⁰ *Ibid.*, p. 85, commentary to rule 54.

etc., are for the most part property appertaining to sovereignty over the territory and its inhabitants, constituting financial means by which or in respect of which this sovereignty is expressed. The legal character of the right to coin money or the privilege of issue, the right to levy taxes, the power of the public authority to take coercive measures to recover debts to the Treasury, Customs duties or public debt-claims is such that it would be inconceivable for the predecessor State to retain these rights and powers.¹⁰¹ This does not necessarily mean that all such patrimonial rights or property belong to what is known in some systems of law as the "public domain of the State", or that they alone belong to it. Such intangible rights as debt-claims or income from a commercial activity of the State may come under the "private domain" in countries where this concept exists or, to put it differently, under the *jus gestionis* as opposed to the *jus imperii*, which characterizes other State activities directly connected with the exercise of sovereignty.¹⁰²

(4) Taking this as his starting point, Professor Guggenheim goes on to say, in particular, that

[. . .] State revenue [. . .] is considered in most countries to belong to the private domain and, as such, to be governed by the civil law. The disposal of State revenue is a matter for agreement between the ceding State and the cessionary State.¹⁰³

In point of fact, State revenue is governed by public law to an increasing extent in most States. The existence of treaty provisions, which are, moreover, extremely rare (see article 256 of the Treaty of Versailles), is hardly sufficient to warrant the conclusion that an obligation exists to determine the disposal of State revenue by agreement. The purpose of this comment is mainly to emphasize, as will be done again later, that a customary rule regarding succession to revenue from taxation exists in the very frequent cases where the matter is not settled by agreement.

(5) According to Professor Guggenheim, an agreement would be particularly useful

where the predecessor State is not incorporated into the successor State and therefore continues to exist [. . .]. If the State is

¹⁰¹ A letter, dated 5 September 1952, from Mr. D. L. Busk, British Ambassador at Addis Ababa to the Ethiopian Minister for Foreign Affairs, specified that

"the transfer of power in Eritrea to the Imperial Ethiopian Government and to the Eritrean Government shall take place on a 'going concern' basis, that is to say, the existing British Administration will collect all revenue and pay all expenses of administration (including third party claims [. . .]) up to 15th September 1952."

(Exchange of notes constituting an agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ethiopia regarding financial arrangements on the establishment of the Federation of Eritrea with Ethiopia. Addis Ababa, 5 and 6 September 1952, United Nations, *Treaty Series*, vol. 149, p. 58.

Although the term "going concern" may be reminiscent of business procedures, it is nonetheless expressive, indicating that the territory has to be transferred with all its financial machinery, as it previously existed (taxes, Customs, currency, Treasury etc.) and operating normally.

¹⁰² See *inter alia* Professor Paul Guggenheim: *Traité de droit international public* (Geneva, Librairie de l'Université, 1953), t. I, p. 467 and 468, foot-note 2.

¹⁰³ *Ibid.*, pp. 468-469.

dismembered, its revenue becomes part of the property to be covered by the settlement. At the time of apportionment, items are usually allocated to the State in which they are situated but are nevertheless charged against its share. Where a State ceases to exist and there is only one successor State, the latter acquires not only the State revenue in the territory of its predecessor but also its revenue in third countries.¹⁰⁴

However, where a State has ceased to exist, there is generally no agreement on the devolution of revenue, and where there is more than one successor State, the agreement, if any, is concluded among these States.

The writer himself limits the scope of his rule by confining its application to taxes: "*Immovable* * property nevertheless passes to the successor State [. . .] if the latter accepts the charges encumbering that property."¹⁰⁵

(6) In the opinion of the Special Rapporteur, there is an *imperative obligation* to devolve all public property appertaining to sovereignty, more especially resources, debt-claims and public funds.¹⁰⁶

B. Patrimonial rights "defined by law"

(7) The question here is whether all intangible rights, both acquired or potential, pass to the successor State. A number of decisions by national courts, particularly by the Polish courts after the First World War, can be cited which interpret succession to public property and to all rights acquired or to be acquired in the broadest and fullest sense.¹⁰⁷

(8) Succession to "rights" and particularly to "interests", a term which, as we have seen, is very vague, implies that it is open to the cessionary State to assert future claims and rights still to be acquired. There are even examples of provisions going beyond succession to rights still to be acquired or to interests. Article 19 of the Convention of 4 August 1916 between the United States and Denmark concerning the cession of territory in the West Indies calls for the cession to the United States of

"all territory, dominion and sovereignty, *possessed, asserted or claimed* * by Denmark".¹⁰⁸

Another example is article 1 of the Treaty of Paris (1861) whereby His Most Serene Highness the Prince of Monaco renounced

in perpetuity, on his own behalf and on behalf of his successors, in favour of His Majesty the Emperor of France, all direct or *indirect* * rights over the communes of Menton and Roquebrune, irrespective of the *origin and nature* * of his rights thereto.¹⁰⁹

(9) Some decisions go so far as to recognize the right of the successor State to demand payments to be made to a third party. In 1866 the Prussian State had concluded an agreement with a city, subsequently ceded to Poland, under which the city was required to contribute towards the upkeep of a secondary school. The Supreme Court of Poland found that the successor State had acquired the rights which the Prussian State derived from the agreement of 1866 even if this were a right to demand payments to be made to a third party, the school having a separate legal personality.¹¹⁰

Article 7. Currency and the privilege of issue

1. The privilege of issue shall belong to the new sovereign throughout the territory transferred.

2. Currency, gold and foreign exchange reserves, and, in general, monetary tokens of all kinds which are proper to the territory transferred shall pass to the successor State.

3. The apportionment of monetary reserves, in cases where there is more than one successor or in cases of dismemberment, shall be determined by treaty, regard being had in particular to the percentage of currency in circulation in that territory.

COMMENTARY

A. Introduction

(1) The problem of currency in cases of the territorial transformation of States is bound up with great technical complexities with which, in the Special Rapporteur's opinion, the International Law Commission need not concern itself in any detail. Even when considered in complete isolation from its financial aspects and strictly within the context of State succession, this question gives rise to problems in so far as *it relates both to succession to public property and succession to public debts*. Instruments of payment generally consist of three kinds of monetary

¹⁰⁸ English text in *Supplement to the American Journal of International Law* (New York, 1917), vol. 11, p. 55; French text in *Revue générale de droit international public* (Paris, 1917), t. XXIV, p. 454. With regard to property "claimed" by Denmark, the predecessor State, see above, commentary to article 2, paras. 9-12.

¹⁰⁹ G. F. de Martens, ed., *Nouveau Recueil général de traités* (Göttingen, Dieterich, 1869), t. XVII, part II, p. 56.

¹¹⁰ Supreme Court of Poland, Case of the Polish State Treasury v. City of Gniezno (1930), in H. Lauterpacht ed., *Annual Digest . . . 1929-1930* (London, 1935), Case No. 31, p. 54 (quoted in *Yearbook of the International Law Commission, 1963*, vol. II, p. 133, document A/CN.4/157, para. 336), and other similar cases.

¹⁰⁴ *Ibid.*, p. 469.

¹⁰⁵ *Ibid.*, p. 468, foot-note 2.

¹⁰⁶ D. Bardonnet (*op. cit.*, pp. 573-574) considers that there is "a presumption of succession to public property in general, whether part of the public or private domain, whether immovable or movable [. . .]. Exceptions to the principle of total transfer must be expressly provided for in the treaties and must be strictly interpreted."

In a work by one of the authors who has attempted to codify international law (J. Internoscia, *New code of international law, 1st ed.* (New York, The International Code Company, 1910), p. 54) we find a rule 310, reading as follows: "A State that inherits must assume the charge of [. . .] (3) the money and property of the fisc (*l'argent et les biens du fisc; il denaro e la proprietà del fisco*)", and a rule 313 which states: "The money, forests, lands and, in general, all movable and immovable property of the treasury of the extinct State becomes its property." (The reference here is to "loss of the whole territory.")

¹⁰⁷ Cf., for example, Supreme Court of Poland, *Polish State Treasury v. Skibniewska* (1928), in A. D. McNair and H. Lauterpacht, ed., *Annual Digest . . . 1927-1928* (London, 1931), Case No. 48, pp. 73-74, which interprets article 208 of the Treaty of Saint-Germain-en-Laye (providing for the transfer of all "property and possessions" to the successors of Austro-Hungary) as including all claims as well.

tokens: first, the metal currency in the strict sense, made up of the small coinage in circulation; second, the bullion or gold reserves providing the backing; thirdly, the paper money or fiduciary currency, whose issue is generally entrusted to a State banking institution. The first two categories of monetary tokens pose the problem of a change of sovereignty in terms of succession to *public property*, while the third, on the contrary, poses the problem in terms of succession to *public debts*. Paper money, generally guaranteed by a gold backing, theroretically constitutes a debt owed by the institution of issue to the bearer of the fiduciary currency.

(2) The following are the conclusions reached by a writer who has made a special study of these questions.¹¹¹

In the case of *partial succession*, and with respect to paper money, he considers that

the debt of the institution of issue represented by its notes is regarded as a direct debt of the State and is consequently *shared* between that State and the States that succeed to one or more parts of its territory, in accordance with the general principles of the apportionment of State debts. This, at least, is the principle recognized in the ordinary law, from which derogations may be made by special treaty provisions. The logical consequence of this first rule of ordinary law is that the *assets* * of the institution of issue, including those earmarked for the backing of issues, must be equally apportioned between the States in the same proportion as the actual debt represented by the issues [. . .]. The apportionment should be in proportion to the quantity of notes held in the former State and each of its separate parts.¹¹²

In the case of *universal succession*, the author considers that

If the State is dismembered and extinguished, it would be necessary to proceed to the complete liquidation of operations of issue and the liquidation of the institution of issue itself. Each of the successor States would participate in this liquidation in proportion to the notes in circulation in its territory on the date of the dismemberment.¹¹³

(3) If the currency problem is divested of its difficulties,¹¹⁴ it may be reduced to the consideration of three points: (a) the privilege of issue; (b) the monetary tokens "proper" to the territory transferred, and (c) cases of dismemberment or cases where there is more than one successor State.

B. *The privilege of issue*

(4) Paragraph 1 of the proposed article does not call for lengthy comment, since it is obvious that the privilege of issue, which is an attribute of public authority, can belong

¹¹¹ B. Nolde. "La monnaie en droit international public", *Recueil des cours de l'Académie de droit international de La Haye, 1929-II* (Paris, Hachette, 1930), t. 27, pp. 243-390 (especially chapter III, "La monnaie en cas de transformations territoriales des Etats et d'exercice temporaire de la souveraineté monétaire", pp. 285-313).

¹¹² *Ibid.*, p. 296.

¹¹³ *Ibid.*, p. 305; see also p. 303.

¹¹⁴ Apart from the substantial bibliography given by Nolde (*ibid.*, pp. 391-393), and some historical examples, see also the lecture given in 1923 by Mr. de Monès del Pujol, the receiver of the Austro-Hungarian Bank: "La solution d'un grand problème monétaire: La liquidation de la Banque d'émission de l'ancienne monarchie austro-hongroise", *Revue des sciences politiques* (Paris, April-June 1923) p. 161-195.

only to the new sovereign in the territory transferred. As drafted, the paragraph does not mean that the privilege of issue is the subject of a succession or a transfer. The predecessor State loses its privilege of issue in the territory transferred and the successor State exercises its own privilege of issue, which it derives from its sovereignty. Just as the successor does not derive its sovereignty from the predecessor,¹¹⁵ so also it does not receive from the predecessor an attribute of sovereignty like the privilege of issue. The paragraph simply states that the privilege of issue "shall belong" to the new sovereign throughout the territory affected by the change. It is not *inherited*. As in the case of any right, however, a distinction must be made between the *possession* and the *exercise* of this privilege. The fact that the successor State may by treaty allow others to exercise or continue to exercise this privilege is evidence that it is in full possession of the privilege, inasmuch as it has the power thus to dispose of it.

(5) Article 3 of the Convention between the United States of America and Denmark providing for the cession of West Indies reads as follows:¹¹⁶

It is especially agreed, however, that:

...

4. The United States will maintain . . .

(h) Concession of June 20th, 1904, for the establishment of a Danish West-Indian bank of issue. This bank has for a period of 30 years acquired the monopoly to issue bank-notes in the Danish West-India islands against the payment to the Danish Treasury of a tax amounting to ten per cent of its annual profits.

The United States was of course subrogated to Denmark, the ceding State, with regard to collection of the 10 per cent tax. However, practices of this kind, which were never very widespread, are dying out, and the successor State itself is exercising its power to coin money and issue notes.

(6) When the independence of the various Latin American colonies was proclaimed at the beginning of the nineteenth century, the Spanish currency was generally not withdrawn. The various republics confined themselves to substituting the seal, arms or inscriptions of the new State for the image and name of His Most Catholic Majesty on the coins in circulation,¹¹⁷ or to giving some other name to the Spanish peso without changing its value or the structure of the currency.¹¹⁸

(7) The successor's sovereign exercise of the privilege of issue has sometimes been limited by treaty. When Genoa was ceded to the King of Sardinia in 1814, it was decided that "the gold and silver currency of the ancient State of Genoa, as they exist, will be accepted by the public treasury concurrently with the currency of Pied-

¹¹⁵ See *Yearbook of the International Law Commission, 1969*, vol. II, p. 77, document A/CN.4/216/Rev.1, para. 29.

¹¹⁶ For the reference, see foot-note 108 above.

¹¹⁷ In Chile the new inscriptions on the Spanish peso in 1817 were: "Liberty, Union and Strength" and "Independent Chile"; in Argentina: "Union and Liberty" and "Provinces of Rio de la Plata". In Peru and Mexico the new emblem, arms or seal were stamped on the coins.

¹¹⁸ "Boliviano", "bolivar", "sucre" were new names given to the Spanish peso in Bolivia, Venezuela and Ecuador.

mont".¹¹⁹ Article 77 of the treaty of peace with Turkey, signed at Sèvres on 10 August 1920,¹²⁰ provided, in connexion with the cession of Smyrna to Greece, for the maintenance of the Turkish currency for five years. The treaty was, however, never brought into force.

(8) The Peace Treaties of Saint-Germain-en-Laye and Trianon with Austria and Hungary had to take account of the wish of the successor States to exercise their privilege of issue, and to cease accepting the Austro-Hungarian paper money that the Bank of the Austro-Hungarian Empire had continued to issue for a short period. This bank was liquidated, and for the most part the successor States over stamped the old paper money during an initial period as outward evidence of their power to issue currency.¹²¹

(9) In the proceedings of the Hague Round-Table Conference, there was one instance of a restriction on the exercise of the privilege of issue. The new Indonesian Republic was required, as long as it had liabilities towards the Netherlands, to consult the Netherlands before establishing a new institution of issue and a new currency. However, this restriction did not last for long.

(10) Ethiopia and Libya apparently did not succeed to the monetary reserves, judging by the more clearly established fact that they did not succeed to the obligations derived from the issue of Italian currency. However, both countries made use of their right of issue to carry out monetary reforms when they became independent. Yugoslavia exercised its privilege of issue in Zone B of the Territory of Trieste by introducing first, in November 1945, a special currency, the "Yugolira", and later the Yugoslav national currency, the dinar.

(11) In pursuance of the decisions taken at the Conference on Indochina held at Pau from 30 June to 27 November 1950, a bank for Indochina was to begin operations on 1 January 1952 with authority to issue piastre notes, which would be individualized for each of the three Associated States of Indochina but would circulate as legal tender throughout those States.

C. Monetary tokens "proper" to the territory transferred

(12) Paragraph 2 of Article 7 covers at least two different possibilities. In the first instance, this paragraph may be regarded, like paragraph 1, as simply a descriptive provision having nothing, strictly speaking, to do with State succession. In cases of *decolonization*, for example, many territories had their own institution of issue and their own currency. The privilege of issue in the territory may have been exercised by a private bank, a governmental body of the metropolitan country or a public body

of the territory. Alternatively, so far as assets are concerned, the monetary tokens in circulation may have been a mixture of the issues of two or more institutions of the kinds mentioned above. The first acceptance of paragraph 2 of the article is simply that whatever portion of those monetary tokens was owned by the territory that is being transferred should normally revert to it, without there being any problem of State succession—or (if one is to speak of succession), should pass under the control of the successor State. However, this paragraph is also intended to cover another possibility, namely, all those cases where the monetary tokens are not the *actual property* of the territory but are *proper* to it. These are cases where the territory was given monetary *autonomy* through an allocation of public property, clearly individualized and separate, originating in the predecessor State. In such cases, the principle of the transfer of public property from the predecessor to the successor should apply.

(13) The Special Rapporteur does not know whether this general pattern has in fact been followed in all or in most cases. A few examples will show that it has been departed from in two opposite ways; sometimes a State irregularly annexes a territory and improperly seizes the monetary tokens, and at other times the successor State cannot recover the gold holdings, foreign exchange reserves, and so forth, or must provide various kinds of compensation in order to do so.

At the time of the *Anschluss* of Austria, Nazi Germany caused the National Bank of Austria to be absorbed entirely by the Reichsbank. It did likewise in the case of the invasion of the Sudetenland and the demise of Czechoslovakia.¹²² It had originally been agreed between Prague and Berlin that the Bank of Czechoslovakia would hand over to Germany about one sixth of its bullion reserve—390 million crowns, or just over twelve tons of gold. However, the German invasion and the dismemberment of Czechoslovakia upset these original arrangements, although the German armies did not find in Prague all the gold coveted by Berlin.

Similarly, to go back in history—still in connexion with Germany—Bismarck caused the bullion reserve of the Bank of France at Strasbourg to be sequestered. This measure was reversed by the Frankfurt Additional Agreement of 11 December 1871, under which Germany, upon annexing Alsace-Lorraine, was to return the bullion that had been kept at Strasbourg by the Bank of France, whose head office is in Paris.¹²³

Under the Treaty of Craiova (7 September 1940), Romania relinquished all public property, including the property of the institution of issue.

¹¹⁹ Protocol of the Congress of Vienna, draft articles annexed to the protocol of the meeting 12 December 1814, in G. F. de Martens, ed., *Nouveau Recueil général de traités* (Göttingen, Dieterich, 1887), t. II, p. 88.

¹²⁰ G. F. de Martens ed., *Nouveau Recueil général de traités* (Leipzig, Weicher, 1924), 3rd series, t. XII, p. 681.

¹²¹ For the details, somewhat complicated, of the measures taken in respect of currency, see the two long articles 189 of the Treaty of Trianon and 206 of the Treaty of Saint-Germain-en-Laye (*ibid.*, p. 491, and *ibid.*, 1923, 3rd series, t. XI, p. 764).

¹²² Cf. R. Sédillot, "Les problèmes financiers du démembrement", *L'Europe nouvelle*, Paris, No. 1101 (18 March 1939), pp. 287-288.

¹²³ At a later date, article 53 of the Regulations annexed to the Convention of 18 October 1907 respecting the Laws and Customs of War on Land permitted (in cases of military occupation and not, of course, of State succession) the seizure of movable property which might be used for military operations and of funds and securities which were the property of the occupied State. (For the English and French texts of the Convention and the Regulations annexed thereto, see J. B. Scott, *The Hague Conventions and Declarations of 1899 and 1907* (New York, Oxford University Press, 1915), pp. 125-126.)

Following Germany's seizure of monetary and exchange reserves during the Second World War, an attempt at reorganization was made after the end of the hostilities through the Paris Agreement of 14 January 1946,¹²⁴ relating to reparation from Germany, the establishment of an inter-allied reparation agency and the restitution of monetary gold.¹²⁵

(14) Leaving the subject of forced transfers of territory or military occupation and reverting to the subject of State succession, attention may be drawn to certain cases of transfer, limited or against compensation, of the monetary tokens "proper" to the territory.

When Transjordan became Jordan, it succeeded to a share of the surplus of the Palestine Currency Board, estimated at £1 million, but had to pay an equivalent amount to the United Kingdom for other reasons.¹²⁶

In the case of Algeria, money on deposit in accounts with the Algerian institution of issue (the Bank of Algeria) at the time of independence was not transferred to the new sovereign. With regard to the Bank's other patrimonial assets, it was agreed that Algeria would pay France 8,000 million old francs as compensation.^{127, 128}

The currency of Czechoslovakia was created in 1919 simply by overprinting the Austrian notes in circulation in the territory of the new Republic and reducing their value by 50 per cent.

The French Government withdrew monetary tokens from the French establishments in India but agreed to pay compensation. Article XXIII of the Franco-Indian Agreement of 21 October 1954 states:¹²⁹

The Government of France shall reimburse to the Government of India within a period of one year from the date of the *de facto* transfer the equivalent value at par in £ sterling or in Indian rupees

¹²⁴ For the English and French texts of the Agreement, see United States of America, Department of State, *Treaties and other International Acts Series*, No. 1655 (Washington, U.S. Government Printing Office, 1947).

¹²⁵ It will be recalled that this gave rise to a case before the International Court of Justice concerning the problem of monetary gold belonging to the National Bank of Albania, which was removed from Rome in 1943 (Case of the monetary gold removed from Rome in 1943 (Preliminary Question)) (Italy v. France, United Kingdom and United States of America: Judgement of 15 June 1954, *I.C.J. Reports 1954*, p. 19).

¹²⁶ See the Agreement of 1 May 1951 between the United Kingdom and Jordan for the settlement of financial matters outstanding as a result of the termination of the mandate for Palestine (United Nations, *Treaty Series*, vol. 117, p. 19).

¹²⁷ The two residences of the Governor and Deputy Governor of the Bank of Algeria were included in the transfer (agreements of 14-19 January 1963, signed in Paris). The Bank, which was formerly named "the Bank of Algeria and Tunisia", possessed the privilege of issue in Algeria and in Tunisia. It lost the privilege as concerns Tunisia when that country became independent in 1956.

¹²⁸ For the opposite view, see G. Fouilloux, "La succession des Etats de l'Afrique du Nord aux biens publics français", *Annuaire de l'Afrique du Nord*, 1966 (Paris, vol. V, 1967). The author, no doubt through lack of knowledge of the facts, lays great stress on "le caractère gratuit des transferts, importants en nombre et en valeur" (*ibid.*, p. 62).

¹²⁹ English text in India, *Foreign Policy of India: Texts of Documents 1947-64* (New Delhi, Lok Sabha (Secretariat), 1966), p. 212; French text in *Recueil des traités et accords de la France*, year 1962, p. 535, and also in *Journal officiel de l'Inde française* (Pondicherry, 22 October 1954), No. 105, p. 567.

of the currency withdrawn from circulation from the Establishments after the *de facto* transfer.

D. Cases of dismemberment or cases where there is more than one successor State

(15) A distinction should first, perhaps, be drawn between cases of dismemberment and cases where there is more than one successor State. The two are not necessarily identical. In cases of dismemberment, the predecessor State always ceases to exist and is partitioned between two or more successors. However, the fact that there is a take-over by the latter does not always indicate dismemberment; the predecessor State may continue to exist, surrendering only part of its territory to be divided between two or more States.

(16) By virtue of its own sovereignty, each successor State possesses its privilege of issue, of which it may dispose at its discretion; no special difficulty arises here. The question which concerns us is how the successors divide the gold holdings, foreign exchange reserves, money in circulation, and so forth. The disposal of this public property is generally governed by an apportionment agreement. It does not seem possible to enunciate a rule for apportionment that would take into account all the factors involved (the size of the territory's population, the comparative wealth of the territory, its past contribution to the formation of the central reserves, the percentage of paper money in circulation in the territory, etc.). It must be borne in mind that the transfer of this paper money to the new sovereign mainly represents *succession to a debt*, whereas the transfer of the bullion reserves represents a *succession to public property*. Thus the successor State usually tries to withdraw the old notes from circulation, both because they represent a debt and because this operation provides an opportunity to manifest its new sovereign power of issue.

(17) With the demise of the old Tsarist empire after the First World War, some of its territories passed to Estonia, Latvia, Lithuania and Poland.¹³⁰ Under the peace treaties concluded, the new Soviet régime became fully responsible for the debt represented by the paper money issued by the Russian State Bank in these four countries.¹³¹ The provisions of some of these instruments indicated that Russia released the States concerned from the relevant portion of the debt, as if this was a derogation by treaty from a principle of automatic succession to that debt. Other provisions even gave the reason for such a derogation, namely, the destruction suffered by those countries during the war.¹³² At the same time and in these same treaties part of the bullion reserves of the Russian State Bank was transferred to each of these States. The

¹³⁰ No reference is made here to the cases of Finland, which already enjoyed monetary autonomy under the former Russian régime, Bessarabia, which was incorporated by the great Powers into Romania, or Turkey.

¹³¹ See the following treaties: with Estonia (2 February 1920), article 12; with Latvia (11 August 1920), article 16; with Lithuania (12 July 1920), article 12; and with Poland (18 March 1921), article 180 (League of Nations, *Treaty Series*, vol. XI, p. 51; vol. II, p. 212; vol. III, p. 122 and vol. VI, p. 123).

¹³² Cf. B. Nolde, *op. cit.*, p. 295.

ground given in the case of Poland is of some interest: the 30 million gold roubles paid by Russia under this head corresponded to the "active participation" of the Polish territory in the economic life of the former Russian Empire.

(18) In the case of India, various agreements were concluded between the United Kingdom and its two former Dominions and also between the two Dominions. The first point to be noted is that India had an entirely separate monetary system before the colonial Power withdrew and the country was partitioned. The only problem which would arise in the normal course of events was the apportionment of reserves and currency between India and Pakistan. As soon after 30 September 1948 as practicable, the Reserve Bank of India was to transfer to Pakistan assets equal to the volume of money actually in circulation at that time in the latter State. Before that date, Indian rupee notes issued by the Reserve Bank of India would still be legal tender in Pakistan. The apportionment of the cash balances of the Reserve Bank of India, which amounted to about 400 crores of rupees, was determined by the agreements of December 1947 between India and Pakistan¹³³ and by the Pakistan (Monetary System and Reserve Bank) Order, 1947.¹³⁴ Pakistan received 75 crores of rupees and also obtained part of the Bank's sterling assets. The ratio of the note circulation in Pakistan and in India to the total volume of money in circulation had been taken into account for the purpose of this apportionment. Pakistan's actual share came to 17.5 per cent.

Article 8. Treasury and public funds

1. Public funds, liquid or invested, which are proper to the territory transferred shall pass to the successor State.

2. Upon closure of the public accounts relating to Treasury operations, the successor State shall receive the assets of the Treasury and shall assume responsibility for costs relating thereto and for budgetary and Treasury deficits. It shall also assume the liabilities on such terms and in accordance with such rules as apply to succession to the public debt.

COMMENTARY

A. Public funds

(1) Public funds "proper" to the territory transferred include, first of all, the funds belonging to the territory as a separate administrative and financial authority. These funds never belonged to the predecessor State at any time when it was still exercising its jurisdiction over the territory; still less can they belong to it after it loses its sovereignty in the territory. Public funds "proper" to the territory transferred must also, however, be understood to mean cash, stocks and shares which, although they form

part of the over-all assets of the State, are situated in the territory or have a relationship to it by virtue of the State's sovereignty over or activity in that region. The principle of total transfer of all the assets of the predecessor State requires that these funds should pass to the successor State.

(2) Examples drawn from practice will show the differences in the situations which are covered as well as the extent to which the principle of transfer has been respected.

Public State funds may be liquid or invested; they include stocks and shares of all kinds. Thus, the acquisition of "all property and possessions" of the German States in the territories ceded to Poland included also, according to the Supreme Court of Poland, the transfer to the successor of a share in the capital of an association.¹³⁵

After the Anschluss of 1938, all Austria's assets, of whatever kind, passed to the Third Reich. The Reich also acquired in Czechoslovakia, under the agreement of 4 October 1941, all the stocks, shares and other interests of the Czech State in enterprises whose business was situated outside Czechoslovakia, as its frontiers were in 1939, and "an equitable share" in the remaining enterprises within Czechoslovakia. Slovakia succeeded to Czechoslovakia's holdings under an agreement with the Third Reich dated 13 April 1940. All the funds of public establishments, "whether or not possessing juridical personality",¹³⁶ became Slovak, automatically and without payment, provided that they were situated in the territory of Slovakia. Hungary, under the agreement of 21 May 1940 with the Reich, succeeded *ipso jure* to the property of establishments "controlled" by Czechoslovakia in the territory taken over by Hungary.

As part of the "transfer without payment of the right of ownership over State property", the USSR received public funds situated in the Sub-Carpathian Ukraine, which, within the boundaries specified in the Treaty of Saint-Germain-en-Laye of 10 September 1919, was ceded by Czechoslovakia in accordance with the Treaty of 29 June 1945.

The Free Territory of Trieste succeeded to all Italy's movable assets, including public funds, under the 1947 Treaty of Peace.¹³⁷

It appears, however, that the public funds of the British Mandatory Government in Palestine were withdrawn by the United Kingdom. Yet this example does not invalidate the general principle inasmuch as a Mandate, which was conceived as an international public service assumed by a State on behalf of the international community, in no way deprives the Mandatory Power of the authority to withdraw its own property when such property is clearly

¹³⁵ Digest by the Secretariat of the decision of the Supreme Court of Poland in *Polish State Treasury v. Deutsche Mittelstandskasse* (1929) (*Yearbook of the International Law Commission*, 1963, vol. II, p. 133, document A/CN.4/157, para. 337).

¹³⁶ "Betriebe, Anstalten und Fonds, mit oder ohne eigene Rechtspersönlichkeit", in the words of the agreement of 13 April 1940, quoted by I. Paenson; *Les conséquences financières de la succession des Etats (1932-1953)* (Paris, Domat-Montchrestien, 1954), p. 104.

¹³⁷ Treaty of Peace with Italy of 10 February 1947, annex X (United Nations, *Treaty Series*, vol. 49, p. 209).

¹³³ See *Keesing's Contemporary Archives, 1946-1948*, vol. VI, January 24-31, p. 9066.

¹³⁴ A. N. Aiyar, *Constitutional Laws of India and Pakistan* (Madras, Company Law Institute of India, 1947), p. 147.

separable and detachable from that of the mandated country.

(3) It will be observed that neither in the proposed draft article nor, thus far, in these commentaries has any distinction been made on the basis of whether one or more than one successor State is involved. Practice shows that where there is more than one the public funds are divided *equitably*, as indicated in connexion with the dismemberment of Czechoslovakia.¹³⁸ Similarly, in the fragmentation of the former Kingdom of the Serbs, Croats and Slovenes, the apportionment of funds and assets was effected *in accordance with the principles of equity*. The Special Rapporteur has accordingly not deemed it necessary to complicate the text of article 8 by recommending equitable apportionment where there is more than one successor State. While he believes that the principle of equity should and must be fully applied, he also believes that any apportionment, if it is to be equitable, must take into account a great many factual data which vary from country to country and situation to situation and which defy codification. In other words, equity means everything and means nothing, and it is as well to leave its exact content to be spelt out in individual agreements.

(4) India succeeded to the sterling assets of the Reserve Bank of India, estimated at £1,160 million.¹³⁹ However, these assets could not be utilized freely, but only progressively. A sum of £65 million was credited to a free account and the remainder—i.e., the greater part of the assets—was placed in a blocked account. Certain sums had to be transferred to the United Kingdom by India as working balances and were credited to an account opened by the Bank of England in the name of Pakistan. The conditions governing the operation of that account were specified in 1948 and 1949 in various agreements concluded by the United Kingdom with India and Pakistan.¹⁴⁰

The Indo-Pakistan agreements of December 1947¹⁴¹ confirmed the application of the principle of succession by each State to all the assets situated in its territory and equitable apportionment of the central assets.

On termination of the French Mandate, Syria and Lebanon succeeded jointly to the “common interests” assets, including “common interests” Treasury funds and the profits derived by the two States from various concessions. The two countries succeeded to the assets of the “Banque de Syrie et du Liban”. However, most of these assets were blocked and were released only progressively over a period extending to 1958.¹⁴²

¹³⁸ See para. 2 above.

¹³⁹ United Kingdom, *Financial Agreement between the Government of the United Kingdom and the Government of India*, Cmd. 7195 (London, H. M. Stationery Office, 14 August 1947).

¹⁴⁰ For details, see I. Paenson, *op. cit.*, *passim* and in particular pp. 65-66 and 80.

¹⁴¹ See foot-note 133 above.

¹⁴² For Syria, see the Convention on Winding-up Operations, the Convention on Settlement of Debt-claims and the Payments Agreement, all three dated 7 February 1949 (France, *Journal officiel de la République française, Lois et décrets*, Paris, 10 March 1950, 82nd year, No. 60, pp. 2697-2700); for Lebanon, see the Franco-Lebanese monetary and financial agreement of 24 January 1948 (*ibid.*, 14 and 15 March 1949, 81st year, No. 64, pp. 2651-2654; also in United Nations, *Treaty series*, vol. 173, p. 99).

As has been noted, Jordan received a share of the surplus of the Palestine Currency Board.¹⁴³ It also came into possession of a number of very small balances of various funds (the Benzine Fund, the Ottoman Agricultural Bank Fund and the Transjordan Frontier Force Fines Fund).¹⁴⁴

The principle of geographical apportionment of movable assets was adopted by the new States of former French West Africa at the Paris Conference of 5 and 6 June 1959. The size of the budgets of the various States and the theoretical proportion of assets brought in by each of them were also taken into consideration. The application of the principle of geographical apportionment placed Senegal in a privileged position, and to compensate for this it waived its share in the assets of the Reserve Fund, which included cash, debt-claims, stocks and bonds, in favour of the other partners. The Federation of Mali was subsequently dissolved and the public funds were divided in the proportion of 38 per cent for Mali and 62 per cent for Senegal.¹⁴⁵

B. Treasury

(5) The public accounts are usually closed as at the date of transfer, and the transfer takes place *ipso facto*. Transfer of the Treasury is always difficult, however, because of the complexity of Treasury operations. The assets, composed of public funds, stocks and securities, budgetary revenues, miscellaneous Treasury income and the movable and immovable intallations used by Treasury departments, should normally be transferred to the successor State. In return, the latter assumes the *liabilities*, comprising miscellaneous and administrative *costs* of the Treasury, the *public debt* proper and any *deficits*.

(6) In cases of total absorption, the Treasury is automatically merged into that of the new sovereign, which must decide the question of liabilities in accordance with the rules governing the public debt. In all other cases of succession the situation is the same except as regards amounts which may be due to the predecessor State if it has a definite debt-claim against, or has granted advances to, the local Treasury. However, these are matters to be dealt with in connexion with the public debt at a later stage, when the International Law Commission will be considering the modalities for extinguishing that debt. It will therefore suffice, at this point, to enunciate a general rule and to disregard differences according to the type of State succession, since the usefulness of such distinctions will become apparent only when the various aspects of the public debt are being studied. The costs which pass to the successor State consist, in particular, of the departmental expenses of the Treasury. Budgetary and Treasury deficits must be carefully distinguished from the liabilities represented by the public debt. The latter is represented by various debt-claims against the Treasury by individuals or bodies corporate. The budgetary or administrative deficit is not necessarily of the same nature or the same origin.

¹⁴³ See above, commentary to article 7, para. 14.

¹⁴⁴ See foot-note 126 above.

¹⁴⁵ See below, commentary to article 9, para. 24, sub-para. 4.

(7) India assumed the deficits of the various accounts in the care of the local administration of the former French Establishments in India.¹⁴⁶

In the case of the advances which the United Kingdom had made in the past towards Burma's budgetary deficits, the United Kingdom waived repayment of £15 million and allowed Burma a period of twenty years to repay the remainder, free of interest, starting on 1 April 1952. The former colonial Power also waived repayment of the cost it had incurred for the civil administration of Burma after 1945 during the period of reconstruction.¹⁴⁷

(8) The Special Rapporteur has suggested a draft article which would oblige the successor State to assume responsibility for costs incumbent on the Treasury which is being transferred by the predecessor State. It should be noted, however, that there have been cases where responsibility for such costs remained with the ceding State. For example, article XII of the Treaty of Peace concluded at Bucharest on 7 May 1918 between the Central Powers and Romania¹⁴⁸ stipulates that the State property (*Staatsvermögen*) of the ceded Romanian territories shall pass to the acquiring States *free and clear of any compensation or costs*. Many more examples of this kind could easily be found.

(9) There are some cases to the contrary, where the ceding State is not only released from all responsibility for costs (which, as has been noted repeatedly above, is then assumed by the successor), but is also tempted actually to transfer only a small part of the assets of the Treasury and of public funds. However, this is generally effected by means of more or less regular operations reducing the transferable assets before the date of actual change of sovereignty. Thus, it may justifiably be stated that the existence of such cases, many and varied as they may be, does not create any doubt as to the existence or the validity of the rule concerning transferability of public funds and assets of the Treasury, as formulated in the text suggested by the Special Rapporteur.¹⁴⁹

¹⁴⁶ Article 20 of the Franco-Indian Agreement of 21 October 1954 (for the reference, see foot-note 129 above) continued, after the words "in respect of all credits" with the words "debts and deficits of the various accounts in the care of the local administration".

¹⁴⁷ The United Kingdom also reimbursed Burma for the cost of supplies to the British Army incurred by that territory during the 1942 campaign and for certain costs relating to demobilization.

¹⁴⁸ G. F. de Martens, ed., *Nouveau Recueil général de traités* (Leipzig, Weicher, 1921), 3rd series, t. X, p. 856.

¹⁴⁹ The Special Rapporteur has in mind, in particular, the case (but is it an isolated case?) of the transfer of the Algerian Treasury at the time when Algeria became independent. While the liquid assets of the Algerian Treasury amounted to some 150,000 million old francs in 1961 (i.e., one year before independence), a letter in March 1961 from the French authorities gave instructions, two months before the Evian negotiations for independence, to transfer as much as possible of those liquid assets to France. Entries in the books of the Algerian Treasury were erased or scratched out or written over, or no entries were made for some operations. Thus, by 16 April 1962 the liquid assets of the Treasury were reduced to 78,600 million and twelve days later (28 April) to 1,100 million. Some public transfers to France were recorded in the books of the Algerian Treasury as "unspecified operations". Transfers of funds were also effected by Algerian public agencies and establishments in contravention of the legislation in force, which was reaffirmed by a Franco-Algerian Protocol of August 1962. The fact that Algeria was made responsible for the payment of very heavy debts, and the use of the Treasury guarantee

Article 9. Public debt-claims

1. Irrespective of the type of succession, public debt-claims which are proper to the territory affected by the change of sovereignty shall remain in the patrimony of that territory.

2. The successor State shall, when the territorial change is effected, become the beneficiary of the public debts of all kinds receivable by the predecessor State by virtue of its sovereignty or its activity in the territory transferred.

COMMENTARY

A. Exposition of the problem: State debt-claims and territorial debt-claims

(1) It is difficult indeed to formulate a uniform general rule on the subject of public debt-claims which would apply to all types of succession—not that the principle of succession to the public debt-claims of a State is in doubt, but there are so many different types of succession that it may prove to be not at all easy to find a single formula covering them all. In addition to the quite clear case of *total absorption*, in which the predecessor State ceases to exist and its successor may properly take over all its debt-claims as well as all its rights, there is the whole range of cases of partial cession, secession, decolonization and dismemberment.

(2) In cases of *partial cession*, *secession* and *decolonization*, the difficulty arises from the fact that there are two distinct categories of public debt-claims. The first comprises claims properly belonging to the territory concerned; the debtor, the title or the pledge (if any) may be

that had been given during the war in respect of many activities, rendered the financial situation very precarious by the time the Treasury was transferred to Algeria on 31 December 1962. The liquid assets were not enough to meet even short-term commitments, quite apart from the pressure exerted on those assets by the funds on deposit in current and other accounts. It should be pointed out, however, that withdrawals of funds in 1961-1962, and even in 1963, by individuals who were leaving Algeria permanently were a strain not so much on the Treasury as on the banking system as a whole, which they dislocated. Transfers in 1962, especially by individuals, have been estimated at about 500,000 million old francs and the total outflow of capital from Algeria between 1961 and 1964 at approximately 1.1 million million. A very cautious study by Mr. Poul Høst-Madsen refers to the difficulty of making estimates of the flight of capital from developing countries (P. Høst-Madsen, "How much capital flight from developing countries?", *Finance and Development* (quarterly publication of IMF and IBRD), Washington, vol. II, No. 1, March 1965, pp. 28-37). However, the author mentions Algeria as the most typical instance of large-scale transfers. "One element in some of these calculations," he writes, "which may give them a degree of plausibility, is the large outflow of capital which in recent years has taken place from Algeria" (*ibid.*, p. 28); and again: "In recent years, the best known instance of a flow of capital from a developing country is the outflow that accompanied the large-scale emigration of Europeans from Algeria during the years before and after that country became independent. This movement of capital was for the most part directed toward France, and is reflected as a large credit entry for 'errors and omissions' in French statistics of economic transactions with the overseas franc area. This entry amounted to \$0.9 billion in 1960, \$1.6 billion in 1961, and more than \$2 billion in 1962 [...] it has been officially estimated that the movement of private capital from Algeria into France reached an equivalent of \$1 billion in 1962*" (*ibid.*, pp. 28-29).

situated either within the territory or outside its geographical boundaries. The second category comprises claims which belong to the predecessor State and arise out of its activity or sovereignty in the territory concerned.

It is the second category that should mainly concern us here, since debt-claims proper to the territory itself remain in its patrimony and cannot be affected by the change which has taken place with regard to sovereignty. If there is any change in their status or in the beneficiary, it occurs not as a result of State succession but by the will of the new State, acting not as successor but as the new sovereign in the territory. Debt-claims proper to the transferred territory therefore remain in its patrimony, even if the ceding State is the debtor. For example, the United Kingdom, as noted above, reimbursed Burma, when it became independent, for the cost of supplies to the British Army during the 1942 campaign which had been borne by that territory and for certain costs relating to demobilization.¹⁵⁰

(3) In cases of *dismemberment*, the same distinction must be made. The various territories which constituted the former State retain their own debt-claims, but those of the State, wherever they are situated and whatever they relate to, have to be allocated. In such cases, as will be seen below, the claims are apportioned equitably among the territories on the basis of various criteria.

(4) For all types of succession, therefore, the problem must be confined to "public debts [. . .] receivable by the predecessor State". However, there is another point which must be taken into consideration. Where it does not entirely cease to exist—for example, in cases of partial cession, secession or decolonization—the predecessor State possesses debt-claims of various kinds and various origins. Those which have strictly no relationship with the transferred territory should not normally be affected by the succession of States, even though it can be argued that the territory may in the past have contributed to the general assets of the State through its economic activity, through its proportion of tax revenue, or in any other indirect and hardly distinguishable manner.¹⁵¹

The Special Rapporteur did not, however, feel obliged or competent to deal with that aspect of the problem. While it is true that the only debt-claims covered by the draft article are those of the predecessor State, they concern debts arising from that State's activity in the territory concerned or originating in its exercise of sovereignty in that territory. This does not mean that such claims are necessarily *situated* in the region which is transferred. All that is indicated is that they are claims which arose on account of the predecessor State, in connexion with or in exercise of its sovereignty in the territory or within the

context of its activity there. The Special Rapporteur accordingly proposes referring to "public debts [. . .] receivable by the predecessor State", and specifying that the latter's claim existed "by virtue of its sovereignty or its activity in the territory transferred".

(5) Some judicial decisions, apparently setting certain limits to the problem, transfer to the successor State those claims "which were in a *definite relationship* * to the acquired territory".¹⁵² For example, in 1928 the Supreme Court of Poland held that the Polish Treasury was entitled to recover a debt owed to the Austrian Government by a farmer who had received a government loan to buy livestock and equipment to replace those destroyed by operations of war. The Polish State was also held to have acquired claims against farmers who had received agricultural machinery on credit from the Austrian Government during the war.¹⁵³ Yet it will be seen on closer examination that these are in fact claims which arose, during the war by virtue of the sovereignty or activity of the Austrian Government in the territory transferred.

(6) However, it was, "*by virtue of its sovereignty* *" ¹⁵⁴ that Poland became possessed of all the debt-claims, as the same court decided in other instances. In *Polish Treasury v. Heirs of Dieltl*, the Supreme Court of Poland held that Poland had acquired claims arising out of a deed executed in 1889 by which defendants' decedent undertook to erect a school for the children of his factory workmen and certain others in territory recovered by Poland from Russia.¹⁵⁵ In this particular case, the successor State became the beneficiary of the debts in question because they arose by virtue not of the sovereignty or activity of the predecessor State (Russia in this instance) but of the sovereignty regained by Poland over the territory concerned.

In strict accordance with this line of thinking, it was in no way surprising that Poland should have objected to the *offsets* proposed by debtors against whom it was proceeding and who relied on their own debt-claims against the predecessor State. Poland declared that it was the beneficiary, by virtue of its own sovereignty, of debts originating in the regained territory. Debtors could not be allowed to exonerate themselves vis-à-vis Poland by pleading their own debt-claims against the predecessor State—in this instance, Austria. Logically, therefore, the fact that Poland had acquired the territory under an international treaty and against payment should have been regarded as a secondary argument. Yet this secondary argument was the only one that was given prominence by the Supreme Court of Poland.¹⁵⁶

¹⁵² Digest by the Secretariat of the decisions of the Supreme Court of Poland in *Polish State Treasury v. Skibniewska* (1928) and *Polish State Treasury v. Czosnowska* (1929) (*Yearbook of the International Law Commission*, 1963, vol. II, p. 133, document A/CN.4/157, para. 338).

¹⁵³ *Ibid.*, paras. 339 and 340.

¹⁵⁴ Digest by the Secretariat of the decision of the Supreme Court of Poland in *Polish Treasury v. Heirs of Dieltl* (1928) (*ibid.*, p. 132, para. 333).

¹⁵⁵ *Ibid.* See also *Graffowa and Wolanowski v. Polish Ministry of Agriculture and State Lands* (1923) (*ibid.*, p. 132, paras. 331-332).

¹⁵⁶ *Polish State Treasury v. Paduchowa and others* (1927) (*ibid.*, p. 133, para. 341).

¹⁵⁰ See foot-note 147 above.

¹⁵¹ This would seem to be the rationale of the criteria and methods that are adopted for the equitable apportionment of assets between two or more successors in cases of dismemberment. The "central" assets held by the Treasury or by the institution of issue in the capital city of the dismembered State are generally divided as though each territory had contributed to their formation. If this argument were applied to cases of partial cession, however, the ceding State itself would have to be regarded as a new successor State, which would be contrary to the principle of identity and continuity of the State.

(7) Some writers make the very justifiable distinction between rights in tangible property and incorporeal rights or debt-claims, but add that the latter are all direct attributes of State sovereignty.¹⁵⁷ In other words, debt-claims fall within the patrimony of the successor State because they are all debt-claims pertaining to sovereignty over the territory. The Special Rapporteur considers this approach of an earlier age to be very outmoded, too narrow and somewhat incorrect today. There are some debt-claims which arise not out of sovereignty, but simply out of the activity of the State.

B. Public debts of all kinds

(8) It should first of all be indicated what is meant by "public" debt-claims. These are incorporeal patrimonial rights of all kinds. The fact that they are public means that they do not belong to individuals, but it does not mean that they are necessarily governed by public law. Public debts may, according to their nature, be governed by either public or private law. Debts governed by public law are those which the predecessor State has acquired, or to which it may lay claim, by virtue of its sovereign prerogatives. One example of this is the collection of taxes. The second category comprises debts of which the State may become the beneficiary as part of its "commercial" or private activity.

(9) The general terms in which article 9 is couched indicate that it is of little importance where the debts are situated. Irrespective of their geographical location, once they are receivable by the predecessor, they are *ipso facto* receivable by the successor, provided, of course, that they pertain to the exercise of sovereignty or of an activity by the predecessor State in the territory transferred. Moreover, a patrimonial right such as a debt-claim, which is *incorporeal*, can only be "situated" as a result of various legal artifices.

(10) The expression "debts [. . .] receivable by the predecessor State" was considered preferable in the context to "debts of which the predecessor State was the beneficiary" or "debts actually owed" to that State. The two latter formulations imply that the reference is to debts which are certain, legally determined and perhaps even in process of settlement. Bearing in mind *de facto* situations which had to be taken into account, it seemed to the Special Rapporteur more correct to use the word "receivable", which is more general and covers debts that might some day, for one reason or another, be owed to the State.

¹⁵⁷ One author, J. T. N. Dimitriu, wrote:

"Mr. Michoud distinguishes two different types of patrimonial or quasi-patrimonial public rights: the first consists in the right to have a public domain [. . .] and the second in the right to levy taxes. The first represents, for the State, a right in tangible property substantially similar to such a right under private law; the second represents a simple debt-claim. To these the author adds the right to establish monopolies, either for tax purposes or for reasons of public policy. *All these rights are direct attributes of the sovereignty* * of the State, or, in short, of the community as a whole. They are not covered by the legal term 'property and possessions' in article 256 of the Treaty of Versailles, since all these rights of Powers are inherent in the State as a legal person" (*Le régime des biens d'Etat cédés en vertu des anciens et des nouveaux traités* (Paris, Presses modernes, 1927) [thesis], p. 86).

(11) Again, "debts of all kinds" means all debts, irrespective of their origin, irrespective of the debtor (natural or legal persons, national, territorial or foreign) and irrespective of their legal nature (secured or unsecured debts stocks, shares, government bonds, and not excluding taxes). It includes debt-claims which constitute the public resources of the State, such as (a) *State property rights*, comprising income from property belonging to the State (logging in national forests, hunting or fishing rights, etc.), income from the State's financial holdings in private enterprises, and income from industrial and commercial operations (tax monopolies, industrial public services); (b) *administrative fees* or remuneration for services rendered; and most of all, (c) *taxes*, which are the supreme expression of sovereignty in that they are levied by authority, on a permanent basis and without any quid pro quo.

(12) In cases of *total annexation*, all debt-claims, like all other public property, pass into the patrimony of the annexing State. But a *problem of recognition* often arises in such cases. The annexation of Ethiopia by Italy in 1936 comes to mind. Emperor Haile Selassie brought an action in the United Kingdom to recover 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 had succeeded the sovereign, who had been divested of all public property. It was only because the United Kingdom subsequently decided to recognize the annexation that the argument of the defence was accepted.¹⁵⁸ The same problem of recognition arose when the Italian Government objected before the French courts to the sale by Emperor Haile Selassie of 8,000 shares in the Franco-Ethiopian Djibouti-Addis Ababa Railway Company, which he held in his sovereign capacity.¹⁵⁹

The total annexation of Austria by the Third Reich resulted in the forced transfer of the debt-claims of the former to the latter. The legislation promulgated simultaneously by the two States on 13 March 1938 to effect the *Anschluss* permitted the absorption of all the property, assets and debt-claims of the Austrian Federal Republic by the Third Reich, which considered itself the universal successor.¹⁶⁰

When Ethiopia regained its independence, it apparently incorporated the predecessor's debt-claims into its patrimony. Under article 34 of the Treaty of Peace with Italy, it succeeded to all the rights, interests and privileges of the Italian State in Ethiopia, which would normally include debt-claims. The same occurred in the case of Albania upon its liberation from the Italian Fascist régime.

(13) In the case of a *partial cession*, such as that of the French Establishments in India, one of the agreements that were concluded to provide for reciprocal compensation of various kinds stated that "on the date of the *de*

¹⁵⁸ See *Yearbook of the International Law Commission, 1970*, vol. II, p. 167, document A/CN.4/226, Part Two, commentary to article 8, paras. 30-31.

¹⁵⁹ *Ibid.*, para. 32.

¹⁶⁰ Germany, *Reichsgesetzblatt* (Berlin, 14 March 1938), year 1938, part I, No. 21, p. 237—cited by I. Paenson, *op. cit.*, p. 143.

facto transfer local public accounts shall be closed in the Establishments Treasurer and Paymaster's books" and that "the Government of India shall take the place of the French Government *in respect of all credits* * [. . .]".¹⁶¹ Similarly, in the case of the cession of southern Dobruja by Romania to Bulgaria under the Treaty of Craiova of 7 September 1940, Romania renounced all debt-claims of the State arising out of arrears of unpaid rentals and all debt-claims against the local authorities. It is true, however, that a *quid pro quo* of 1,000 million lei was granted to Romania.

(14) Debt-claims also include *all stocks and shares* owned by the State. As an example of the type of succession following decolonization, the Belgo-Congolese Convention of 6 February 1965, signed at Brussels by Paul-Henri Spaak and Moïse Tshombe,¹⁶² might be cited. As can be seen, this instrument, which is entitled "Convention for the settlement of questions relating to the public debt and *portfolio of the Belgian Congo Colony* *", linked¹⁶³ the effective transfer of the Congolese portfolio to the recognition of certain public debts by the independent Congo. The dispute related to some 60,000 million Belgian francs, and the stocks and shares which were to be transferred to the Congo were valued at 15,000 million Belgian francs. The Convention, as concluded, was essentially a political compromise which departed considerably from the principles of State succession in respect of public property. It made the Democratic Republic of the Congo the owner of the portfolio which had formerly belonged to the colony. In return for the effective transfer of the securities constituting the portfolio, the Congo undertook not to change the pre-existing obligations towards the companies and agencies in which it held shares.

C. Tax debt-claims

(15) Irrespective of the type of succession, it would appear that, unless there is a special agreement covering the particular case, the cessionary State succeeds to all taxes and, more generally, to all debt-claims appertaining to the prerogatives of sovereignty. The change of sovereignty does not dispense anyone from the payment of taxes and duties provided for under the previous laws, so long as they have not been repealed or amended.

It was held that the fact that Savoy had been annexed to France did not release a petitioner from the registration taxes which he owed under Sardinian law.¹⁶⁴

When Alsace-Lorraine was annexed by the German Empire in 1871, a distinction was made by treaty between

private debt-claims of the Treasury and debt-claims connected with taxes.¹⁶⁵ Protocol No. 1 of the Frankfurt Conferences, of 6 July 1871, states the following:

There are some debt-claims which, being essentially private and to some extent personal, are totally distinct from those which the change of sovereignty carries with it. This is so, for instance, in the case of funds advanced to French industrialists established in the ceded territories.¹⁶⁶

It was accordingly laid down, in article VIII of the Final Protocol to the Additional Agreement of 11 December 1871, that

The German Empire shall allow the French Treasury every facility for the recovery of any debts, secured or unsecured, the repayment of which it may have occasion to claim against debtors domiciled in the ceded territories under instruments or titles prior to the Treaty of Peace and which are not connected with ordinary taxes or other levies.¹⁶⁷

(16) Despagnet, in his *Cours*,¹⁶⁸ bases himself on a stipulation in strict treaty form when he argues that, as laid down in 1871, funds advanced by a ceding State did not create a public right and could therefore remain in the patrimony of the ceding State. But if one considers instead the situation after the First World War, it will be seen that the ceding States were not allowed to claim payment of certain debts, such as funds advanced by them to individuals or local bodies, in view especially of the fact that individuals and administrative authorities of the ceded States had large claims against the ceding States because of the compulsory war loans floated by the latter.¹⁶⁹

(17) To revert to the aforementioned Additional Agreement of 11 December 1871, however, it will be noted that the Agreement indicates *a contrario*—and this is the matter of particular concern to us here—that *the power to tax, being essentially a prerogative of sovereignty, belongs to the successor State, and to it alone, throughout the territory which is transferred*.¹⁷⁰ There may be a time problem in this case. Between the time when the agreement is concluded and the time of the actual change of sovereignty, taxes may have been levied by the former Power which is ceding the territory. Disputes may then

¹⁶⁵ See Preliminaries to Peace of 26 February 1871 (M. de Clercq, *Recueil des traités de la France* (Paris, Durand, 1880), t. X, p. 430), Treaty of Peace of 10 May 1871 (*ibid.*, p. 472), Additional Agreement to the Treaty of Peace of 11 December 1871 (*ibid.*, p. 531), Protocol No. 1 of the Frankfurt Conferences, Conference of 6 July 1871 (*ibid.*, p. 503).

¹⁶⁶ *Ibid.*, p. 507.

¹⁶⁷ *Ibid.*, p. 541.

¹⁶⁸ F. Despagnet, *Cours de droit international public*, 4th ed. (Paris), para. 99.

¹⁶⁹ See article 205, fourth paragraph, of the Treaty of Saint-Germain-en-Laye (*British and Foreign State Papers*, vol. 112, p. 409) and article 188 of the Treaty of Trianon (*ibid.*, vol. 113, pp. 561-562).

¹⁷⁰ With regard to the power to tax in Alsace-Lorraine after those territories were returned to France in 1918, see Conseil d'Etat, Ziwi judgement, 4 November 1932, in *Recueil des arrêts du Conseil d'Etat* (collection Lebon) (Paris, Sirey, 2nd series, 1932), t. 102, p. 907, and in M. Dalloz, *Recueil périodique et critique de jurisprudence, de législation et de doctrine* (Paris, Jurisprudence générale Dalloz, 1933), 3rd part, p. 4; and Judgement of the Tribunal supérieur de Colmar of 13 March 1922 (Koch as executor of Jaunez v. Registry), cited—along with very voluminous precedents and practice—in A.-Ch. Kiss, *Répertoire de la pratique française en matière de droit international public* (Paris, C.N.R.S., 1966), t. II, pp. 335-337.

¹⁶¹ Articles XIX and XX of the Franco-Indian Agreement of 21 October 1954. See foot-notes 129 and 146 above.

¹⁶² United Nations, *Treaty Series*, vol. 540, p. 227.

¹⁶³ After various complications, accounts of which were given in the second and third reports of the Special Rapporteur (see *Yearbook of the International Law Commission*, 1969, vol. II, pp. 96-97, document A/CN.4/216/Rev.1, paras. 131 and 138; and *ibid.*, 1970, vol. II, p. 165, document A/CN.4/226, Part Two, commentary to article 8, paras. 20-21).

¹⁶⁴ France, Cour de Cassation, Civil Chamber, Judgement of 30 August 1864, Barjaud v. Registry (M. Dalloz, *Jurisprudence générale: Recueil périodique et critique de jurisprudence, de législation et de doctrine*, part one (Paris, Bureau de jurisprudence générale, 1864), p. 351).

arise, and have in fact arisen, as a result of claims for refunds submitted by individuals against the former sovereignty, such claims being themselves the result of demands for payment made on the individuals in question by the new sovereign.

(18) The problem of the date of transfer is the subject of a separate article (article 3) with a commentary. However, unless there are special circumstances or the two States agree, as they do in some cases, to the reciprocal waiver of such claims, with or without lump-sum payments in compensation, it is generally felt that, once the treaty has been consummated by ratification—i.e., has entered into force and become applicable—the territory is deemed to have been ceded even if the cession does not become effective until later. This is by no means the end of the problem, however. In the first place, it may happen that the transfer of territory occurs without the conclusion of any agreement in good and due form. Furthermore, the principle of good faith in international relations must be able to apply fully during the period between the decision to effect the transfer and its actual implementation.¹⁷¹

(19) In the case under discussion, concerning Alsace-Lorraine in 1871, claims for refunds of taxes and other levies were addressed to the German Government, in order that the dispute might be settled between the States. However, this has not been the rule in all cases.

(a) *Cases of cession of part of the territory and of dismemberment*

(20) In a number of cases, although the tax debt-claim had by law arisen and accrued to the ceding State *prior to the decision concerning the change of sovereignty*, the successor State nevertheless demanded and obtained payment for its own account, thus forcing the debtor either to incur the hazards of legal action to secure a refund or to resign himself to making payment twice over.

In a series of decisions, the Supreme Administrative Court of Czechoslovakia found that it was as a consequence of its own territorial sovereignty that the Czechoslovak State had collected all rates and taxes payable on Czechoslovak territory but not yet paid on the day of the State's coming into existence, and that the Czechoslovak State was entitled not to recognize the payments which were made to foreign authorities after the decisive date. An appellant contended unsuccessfully that the Czechoslovak State was not entitled to collect a fee to which a claim of the former Austrian State had arisen before 28 October 1918 and which had been paid to the Austrian authorities in Vienna on 29 November 1918. The Court held that since 28 October 1918 the right to collect taxes in Czechoslovakia, *including taxes due before that day*, belonged only to the Czechoslovak State.¹⁷²

¹⁷¹ This is the period which the Special Rapporteur referred to in his first report as the "*période suspecte*" (see *Yearbook of the International Law Commission*, 1968, vol. II, p. 104, document A/CN.4/204, para. 69). See also *ibid.*, 1970, vol. II, pp. 141-143, document A/CN.4/226, Part Two, commentary to article 1, paras. 36-46.

¹⁷² *Yearbook of the International Law Commission*, 1963, vol. II, pp. 134-135, document A/CN.4/157, para. 354. See also A. D. McNair and H. Lauterpacht, ed., *Annual Digest . . . , 1925-1926* (London, 1929), Case No. 48, p. 68.

Another case related to the territory of Hlučín (Hultschin), which was ceded by Germany to Czechoslovakia by virtue of the Treaty of Versailles and actually annexed in January 1920. Czechoslovakia had decided that the previous local law, in so far as it was consistent with the new sovereignty, would remain in force, and the Czechoslovak authorities had accordingly demanded from an owner of coal mines in the ceded territory the payment of coal duty due for a certain period prior to the incorporation. The Czechoslovak Supreme Court allowed the claim of the applicant authorities and held that payment to the German Treasury would be inconsistent with the new sovereignty, would not discharge the debt and must be made to the Czechoslovak Treasury.¹⁷³

Poland was not considered to be the successor to the Prussian and German States. The Polish Supreme Court held that Poland had acquired *modo originario* the property and possessions of those two countries, and in particular the rights which the Prussian State derived from an agreement concluded in 1866 between the Prussian State and the City of Gniezno, even if that were a right to demand payments to be made to a third party.¹⁷⁴

(b) *Cases of decolonization*

(21) It is, perhaps, understandable in a case of dismemberment or partial cession of territory that the taxes, duties and other levies payable in the territory should pass to the successor State only on the date of the change of sovereignty, since prior to that date they belonged to the central Government of the ceding State and the revenue from them might have been used both in the ceded territory and throughout the rest of the country. To refuse to allow the predecessor State to receive this revenue, when it comes from debts which were due at an earlier date or to which, in other words, its nationals generally—and not only the residents of the territory that is transferred—have a right, would be to place at a disadvantage those members of the population who have remained subject to the jurisdiction of the predecessor State.

(22) The situation is completely different in the case of decolonization. The various taxes and the like were levied *on behalf of the dependent territory by a separate administration for the benefit of a separate Treasury*. After independence, these charges are levied on behalf of the liberated State. Thus, in the case of decolonization, there is no change in the beneficiary of the debt; to be more precise, there is a change in the political capacity and

¹⁷³ See *Yearbook of the International Law Commission*, 1963, vol. II, p. 135, document A/CN.4/157, paras. 355-356. See also McNair and Lauterpacht, ed., *Annual Digest . . . , 1927-1928* (London, 1931), Case No. 53, p. 78.

¹⁷⁴ The City of Gniezno was to pay quarterly contributions towards a secondary school (*Polish State Treasury v. City of Gniezno* (1930) (*Yearbook of the International Law Commission*, 1963, vol. II, p. 133, document A/CN.4/157, para. 336, and H. Lauterpacht, ed., *Annual Digest . . . , 1929-1930* (London, 1935), Case No. 31, p. 54; *Zbiór Orzeczeń Sadu Najwyższego*, III (1930), No. 52). See also *Polish State Treasury v. District Community of Swiecie* (1929) (*Yearbook . . . , 1963*, vol. II, p. 132, document A/CN.4/157, paras. 334-335; H. Lauterpacht, ed., *Annual Digest . . . , 1929-1930* (London, 1935), Case No. 30, p. 52; *Zbiór Orzeczeń Sadu Najwyższego*, III (1929), No. 21).

status of the beneficiary, but so far as taxation is concerned it is still, as before, a separate territorial authority for tax purposes. Consequently, the question whether the former metropolitan country may levy taxes on its own behalf during the transitional period does not arise, since even in the colonial phase the tax revenue accrued to the territory. It would therefore seem logical to take the view that in the case of decolonization the "Czechoslovak solutions" described above¹⁷⁵ are the only correct ones.

(23) However, while the principle of "succession" to tax debt-claims is beyond question in cases of decolonization, the application of that principle in practice encounters many difficulties, especially if independence is accompanied by an exodus of colonials returning to the former metropolitan country. In every case which the Special Rapporteur has had access to and has studied, it is clear that many individuals and corporations left the territory without paying all or part of the taxes, duties and other levies which they owed to the local Treasury.

As to whether the State which has become independent may be able to collect these taxes in the territory of the former metropolitan country with the agreement of the *ceding State*, the possibilities are meagre.¹⁷⁶ Even after independence and over a period of years, it is not always possible for the newly independent State to collect the amount due in taxes from nationals of the former metropolitan State who for a time continued to live in the former colony.

D. Cases where there is more than one successor State

(24) The various problems which arise are usually resolved by means of special agreements. As a result of the

¹⁷⁵ See para. 20 above.

¹⁷⁶ In the case of Algeria, which is the least unfamiliar to the Special Rapporteur, the upheavals that occurred in the territory during the two years preceding independence prevented the full collection of taxes. The budget estimates for 1960, 1961 and 1962 amounted to 268,000, 304,000 and 321,000 million old francs respectively. The actual tax revenues for those years were 175,000, 167,000 and 103,000 million francs. Thus, the disturbances of all kinds were such that between 1960 and 1962 Algeria's budget deficit amounted to 448,000 million francs. In particular, for 1962, during which the transfer of sovereignty occurred, less than one third of the estimated amount was realized (103,000 million out of 321,000 million). The Algerian Government sought the help of the French Government in collecting the tax debts, but the latter Government indicated that enforced recovery in France of taxes payable to Algeria by repatriates was out of the question. More generally, with respect to debt-claims of all kinds and not only those connected with taxes, Algeria unsuccessfully sought, especially during the financial negotiations of 14-19 January 1963, financial action by France with a view to the establishment of a "Fund for the Settlement of Unpaid Debts". The Algerian authorities subsequently required French nationals, on final departure from Algeria, to produce at the frontier post a "tax clearance certificate" issued by the Algerian taxation services. This document was replaced a little later by a simple unsworn declaration countersigned by the French Embassy at Algiers, which to some extent constituted a subrogation or guarantee by the French Government. In practice, however, it was physically impossible for the Embassy to play its full part as a guarantor. When the French Minister for Foreign Affairs, Mr. Maurice Schumann, visited Algiers in October 1969, a tax agreement was signed under which the Algerian and French Treasuries undertook to recover on each other's behalf any tax which might be owed by an individual who was in their respective territories. So far as the past was concerned, however, there could be no hope of recovery.

agreements (in so far as they can be considered valid!) of 13 April 1940, 21 May 1940 and 4 October 1941 concluded by the Third Reich with Slovakia, Hungary and the Protectorate of Bohemia-Moravia respectively, the public debt-claims of the dismembered State, Czechoslovakia, were to be apportioned among the four successors according to the manner in which they pertained to the territory of each successor. Similarly, when Czechoslovakia was reconstituted in 1945, it succeeded in the same way and no less fully to all the debt-claims of, for instance, the Hungarian State with respect to the portion of territory which was recovered.

In the case of the dismemberment of Yugoslavia, arrears of taxes and Customs duties unpaid as at 15 April 1941 were to be paid to the State in whose territory the competent tax collection office was situated.

The succession of India and Pakistan to the United Kingdom occurred in violent circumstances. However, under the agreements between India and Pakistan of December 1947, each of the two successor States¹⁷⁷ retained the revenue from taxes collected after 14 August 1947.¹⁷⁸ It was unsuccessfully proposed by Pakistan that the revenue from all taxes collected up to 31 March 1948 should be pooled, with a view to apportioning it later. Taxes continued to be collected in accordance with the previous legislation by each of the two States on their respective territorial bases. The place where the taxation authority is situated determined the competent tax jurisdiction in case of dispute.

In the case of Senegal, a threefold succession was necessary: to France, to former French West Africa and to the Federation of Mali. With regard to the second of these, an inter-State conference met in Paris and decided unanimously, on 5 and 6 June 1959, to adopt the principle of geographical apportionment of movable (and immovable) assets, subject to compensatory payments to equalize the portions.¹⁷⁹ An agreement of 22 March 1960, adopted at the Conference of Presidents and Prime Ministers of the Republics of former French West Africa, confirmed the principle of devolution of assets according to the criterion of geographical apportionment. Senegal, which as a result of this was in a privileged position, waived its share in the assets of the Reserve Fund, which included debt-claims, stocks and bonds as well as cash, in consideration whereof the creditor States cancelled the balances standing to the debit of Senegal. Where its portion of assets was concerned, Senegal was subrogated to former French West Africa with respect to shares, funds advanced and guaranteed debts situated in its territory. In exchange, it assumed the financial liabilities of former French West Africa with respect to common harbour and railway services.

¹⁷⁷ The term is perhaps incorrect, since it will be recalled that India was considered to be an original State for the purposes of State succession in an international organization. See United Nations, *Repertory of Practice of United Nations Organs*, vol. I (United Nations publication, Sales No. 1955.V.2 (vol. I)), Article 4, paras. 32-37.

¹⁷⁸ See foot-note 133 above.

¹⁷⁹ See J.-Cl. Gautron, "Sur quelques aspects de la succession d'Etats au Sénégal", *Annuaire français de droit international*, 1962, Paris, vol. VIII, p. 840.

The dissolution of the short-lived Federation of Mali was regulated, so far as debt-claims are concerned, by a Senegalese-Malian Resolution No. 11, which allowed each State to take over assets according to their geographical location. The proportions in which movable assets were divided between the two States was set (as in the case

of immovable assets) at 62 per cent for Senegal and 38 per cent for Mali. The State which received a larger portion of assets than was due to it was subject to an equalization payment, charged against its share in the Reserve Fund.¹⁸⁰

¹⁸⁰ *Ibid.*, p. 861.