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

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Public property

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Introduction

1. The Special Rapporteur devoted his third [1] and fourth reports [2] to the problem of succession of States to public property. The purpose of the present study is, first, to summarize the contents of those reports in order to facilitate their initial consideration by the International Law Commission at its twenty-fourth session. It also makes certain changes in the fifteen draft articles [3] originally proposed to cover the whole topic of public property by means of a uniform approach, irrespective of the type of succession.

I. Pragmatic presentation of the problem

2. In taking up in his report the topic of succession of States to public property, the Special Rapporteur did not base his approach on theory, but simply tried to state some pragmatic rules drawn from the practice of States. He therefore deliberately refrained from going into *the preliminary question* whether the transfer of public property is in fact part of the international law of State succession.

It might well be argued that since State succession consists of the replacement of one sovereignty over a territory by another, this means that the previous sovereignty automatically loses its material support and that the right of the predecessor State to public property therefore passes *ipso jure* to the successor State. The right to public property would thus be seen as an effect of the coming into existence, or of the existence, of a new subject of international law in the territory concerned, and not as a consequence of State succession *per se*.

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

[2] *Ibid., 1971*, vol. II (Part One), p. 157, document A/CN.4/247 and Add.1.

[3] *Ibid.*, p. 160 (Part One).

3. Viewed in this light, the theory of State succession would not apply to the rights and obligations of the State in relation to public property. Once international law recognizes the validity of the new juridical order, this would entail for the successor State a right to all State-owned public property. More precisely, international law would simply recognize the validity of the new juridical order of the State expressed by and through the municipal legislation under which the automatic transfer of the right to public property takes place.

4. This approach reduces sovereignty to something that would be inconceivable without a set of operational and material attributes such as, for example, the public property which the State uses to meet certain essential requirements of the inhabitants of its territory. However, this approach is open to one rather serious objection. If the successor State automatically acquires public property by the mere fact of its own sovereignty and its own power, how does it come about that property situated outside the territory affected by the change, i.e. outside the successor State's sphere of territorial jurisdiction, may fall within its patrimony?

5. The Special Rapporteur accordingly abstained from any purely theoretical study of this problem and of other problems which may arise from State succession to public property, and confined himself to preparing draft articles in terms as specific as possible. Throughout his work he tried to keep in mind a concern which may be expressed in the form of three questions: (*a*) What is *public property*? (problems of defining and determining such property); (*b*) What is *transmissible* public property? (is it all public property, or property of public authorities, or State property alone? Is it all State property or only the property appertaining to sovereignty?); (*c*) Is the *ownership* of the property transmitted (this is a question of succession to property *stricto sensu*) or is the property merely placed under the control of the new juridical order (this brings in succession to legislation as well)?

II. Summary of the third report

6. With these questions in mind, the Special Rapporteur began for the twenty-second session and continued for the twenty-third session of the Commission a study, presented in the form of draft articles, on State succession to public property. For the twenty-second session he prepared four draft articles with commentaries and observations.[4]

7. Article 1 gave a *definition*, and also suggested methods for the *determination*, of public property. Such property was said to be "public" in character by virtue of its *belonging* to the State, a territorial authority thereof or a public body. The Special Rapporteur's commentaries stressed three points:

(*a*) That a purely internationalist approach to the notion of public property is impracticable, since there is in international law no autonomous criterion for determining what constitutes public property;

(*b*) That determination of public property by treaty or by the decisions of international tribunals has its limits and does not solve all problems; and

(*c*) That whatever the circumstances, recourse to municipal law for such determination seems inevitable, the essential question being which legislation—that of the predecessor State, that of the successor State or that of the territory affected by the change of sovereignty—should be applied for that purpose.

8. The Special Rapporteur, finding practice and judicial decisions somewhat contradictory, proposed that the determination of what constituted public property should be made by reference to the municipal law which governed the territory concerned, "save in the event of serious conflict with the public policy of the successor State". He explained his reasons for this, in paragraphs 9 to 13 of the commentaries on article 1 in his report to the twenty-second session. However, it stands to reason that, as soon as the municipal law of the predecessor State or of the territory affected by the change of sovereignty has performed its function of determining what constitutes public property, it gives way to the juridical order of the successor State. Once the property has been classified for purposes of transfer, the successor State resumes its sovereign power to change the legal status of the property devolving to it, if it so desires.

In the drafting of article 1, however, the Special Rapporteur left the problem open to discussion by proposing provisionally a solution making it possible to waive the application of the law of the predecessor State in favour of the legislation of the successor State if there would otherwise be a risk of serious conflict with public policy.

9. Be that as it may, the Special Rapporteur's only ambition in the draft definition was to define *public property*, whether it belongs to the State, to a territorial authority or to a public body. A further problem was whether all this public property was *transferable* to the successor State. This, indeed was the whole problem to be settled by the succeeding draft articles. Thus the definition and determination of public property were to open the way to the distinction between the actual transmittal of State property and the mere placing of public property under the control of the juridical order of the successor State.[5]

10. Bearing in mind that neither the writers nor judicial decisions have exhausted discussion on the question whether property in the *private domain* of the State is transferable *ipso jure* on the same grounds as property in its *public domain*, the Special Rapporteur sought to avoid this distinction [6]—which, indeed, is unknown to

[4] *Ibid.*, *1970*, vol. II, p. 133, document A/CN.4/226.

[5] *Ibid.*, *1971*, vol. II (Part One), pp. 174-175, document A/CN.4/247 and Add.1, paras. 2-5 of the commentary to article 5.

[6] The Sixth Committee, in its report to the General Assembly at its twenty-sixth session, states that some representatives, "recalling the principle *nemo plus juris transferre potest quam ipse habet*", expressed disagreement "with the attempt made by the Special Rapporteur to divide State property into the private domain and the public domain". (*Official Records of the General Assembly, Twenty-sixth Session, Annexes*, agenda item 88, document A/8537, para. 136). An error must have occurred, for it is clear, on the contrary, that the Special Rapporteur made every effort to avoid this distinction, which is not universal.

some national systems of law—and proposed for discussion by the Commission, a draft article 2 under which the general principle of immediate transmittal without compensation can apply only to *property appertaining to sovereignty*. By that expression, the Special Rapporteur meant property which, in accordance with the legislation of the predecessor State, helps to serve the general interest and through which the State expresses its sovereignty over the territory. The composition of such property varies from State to State and from one political system to another. That is inevitable. All property which closely follows the legal destiny of the territory and which is necessary to public activity or to the expression of the State's sovereignty is transmissible. It is, as the French Minister for War put it in a memorial to the Conseil d'Etat "an inseparable attribute of sovereignty, which moves with it, no special stipulation being required in order to transfer the attendant benefit and responsibility".[7]

11. In this article the Special Rapporteur brought out the difference between State property appertaining to sovereignty, which is transmissible, and property of the territory ceded, which remains in that territory's patrimony. It is obvious that the latter property should not devolve to the successor State and that it remains the territory's property, except, of course, where the predecessor State is absorbed in its entirety, in other words, when there is *ex hypothesi* no property of the territory itself distinct from the property of the State which has ceased to exist, the ceded territory being co-extensive with the former territory. It is no less evident, however, that this does not amount to maintenance of the *status quo ante*. The Special Rapporteur explained that public property owned by the ceded territory continues to belong to it, but must of course follow the legal and political destiny of the territory which passes under another sovereignty. It will therefore be governed henceforth by the legislation of the successor State. In brief, it is not affected by the change of sovereignty so far as ownership is concerned, but passes within the juridical order of the successor State.

12. Another draft article [article 7] dealt with the fate of archives, works of art, museums and public libraries. The Special Rapporteur noted that this matter had been regulated by treaty—at any rate in cases of what may be called traditional succession—in quite considerable detail. In his opinion, the principle of the transmittal of archives to the successor State had been accepted, irrespective of the nature of the items concerned. The link between archives and territory was not overlooked, since the proposed text stated the principle that the handing over applies to archives *relating directly or belonging to the territory*.

The Special Rapporteur held that practice authorizes the transmittal to the successor State of archives situated outside the territory because they have been either removed thither or established there. However, this does not occur without a *quid pro quo* and the imposition of responsibilities on the successor State: in particular, the obligation to supply the predecessor State and any third State concerned with copies of these items, save where they affect the security or sovereignty of their new owner.

13. The distribution of public documents among more than one successor State raises more complex but, in view of the advances made in methods of reproduction, by no means insoluble problems. In so far as the archives are divisible, each of the successor States receives such part of the archives as is situated in the territory over which it henceforth exercises its sovereignty. If the central archives are indivisible they are placed in the charge of the State which they concern most directly, and that State is then responsible for making copies of them for the other States.

The Special Rapporteur also described the practice followed with regard to the transmittal of archives and libraries free of cost and with regard to time-limits for handing over the archives.

14. A fourth article [article 8] dealt with the fate of public property of the ceded territory which is situated outside it. Subject to the application of the rules relating to recognition, such public property passes not into the patrimony, but within the juridical order, of the successor State. The actual ownership of this property devolves to the successor State only in cases of total absorption or of decolonization: i.e. where the territory affected by the change of sovereignty no longer possesses a separate personality or legal status (absorption) or has acquired a new one (decolonization).

The Special Rapporteur considered separately the case of property of a ceded territory situated in a predecessor State which has not ceased to exist, and the case of property situated in a third State.

III. Summary of the fourth report

15. In his fourth report,[8] for the Commission's twenty-third session, the Special Rapporteur supplemented the four articles already mentioned with further provisions, beginning with the articles listed in his third report for formulation later. These relate to:

(a) *Intangible property and rights* (currency and the privilege of issue, Treasury and public funds, public debt-claims and rights in respect of the authority to grant concessions);

(b) *Property of the State in public enterprises or public corporations* (property of enterprises; provincial and municipal property);

(c) *Property of foundations.*

16. Article 7 dealt with currency and the privilege of issue. The complex technical problem of currency concerns both succession to *public property* and succession to *public debts*. In theory, paper money constitutes a debt owed by the institution of issue to the bearer of the fiduciary currency.

[7] France, Conseil d'Etat, 28 April 1876, Ministre de la guerre c. Hallet et Cie, *Recueil des arrêts du Conseil d'Etat* (Paris, Marchal, Billard, 1876), 2nd series, vol. 46, p. 398, foot-note.

[8] *Yearbook of the International Law Commission, 1971*, vol. II (Part One), p. 157, document A/CN.4/247 and Add.1.

The predecessor State loses its privilege of issue in the territory transmitted, and the successor State exercises its own privilege of issue. The proposed article specifies that this privilege *shall belong* to the new sovereign, signifying that it is not inherited.[9]

Monetary tokens of all kinds proper to the territory transmitted (where there was previously monetary autonomy, as in the case of former colonies) pass into the control of the successor State.

Cases of dismemberment and cases where there is more than one successor State were also contemplated, in a separate paragraph of the draft article. At that stage of his study of the question, however, the Special Rapporteur did not consider it possible to propose a general rule for the apportionment of currency that would take into account all the quantitative factors involved (the numerical size of the various populations, the level of wealth of the territory, its past contribution to the formation of central monetary reserves, the proportion of paper money in circulation in the territory, and so on).

17. In draft article 8 the Special Rapporteur dealt with the problems of the *Treasury and public funds*. Where public funds are the property of the territory transferred[10] they pass under the control of the new juridical order.

So far as the remainder—i.e. the State Treasury—is concerned, the successor State, upon closure of the public accounts, receives the assets and assumes responsibility for cost relating thereto and for budgetary and Treasury deficits. It also assumes the liabilities, on such terms and in accordance with such rules as apply to succession to the public debt, which will be examined at a later stage.

The Special Rapporteur pointed out in his report that the proposed article does not contain a specific provision for cases where more than one successor State is involved.[11] Practice shows that, in such cases, the public funds are divided *equitably*; but a careful scrutiny of such practice reveals the extreme technical complexity and variety of the arrangements that have been adopted. In the Special Rapporteur's view, this made it impossible, at that stage, to go any further towards laying down a comprehensive and detailed rule.

18. The question of *public debt-claims*, with which the Special Rapporteur dealt in draft article 9, was presented first of all in terms of a distinction between *State debt-claims* and *territorial debt-claims*. The Special Rapporteur drew attention to the difficulty of formulating a uniform general rule on the subject of public debt-claims which would apply to all types of succession.

Leaving aside the eminently 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 its rights, the Special Rapporteur felt able to affirm that claims properly belonging to the territory transmitted, in respect of which the debtor, (on the title or pledge, if any) may be situated either within or outside the territory, remain in the patrimony of that territory irrespective of the type of succession and are not affected by the change of sovereignty. If there is any change in the beneficiary or in the status of the claims, 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.

Where State debt-claims, irrespective of their motive, are *receivable* by the predecessor State by virtue of its activity or its sovereignty in the territory transmitted, the successor State becomes the beneficiary. The Special Rapporteur stressed in his commentary the magnitude and variety of such claims, which include tax debt-claims.[12]

Cases where there is more than one successor State are always complex and are usually resolved by specific agreements dealing in detail, often through expert commissions, with the technical and financial problems involved.

19. In draft article 10, the Special Rapporteur dealt with *rights in respect of the authority to grant concessions*. The successor State is 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 transmitted, and generally in respect of all public property covered by concessions.

This provision expresses the concern, approved by the United Nations, to secure recognition for the right of nations to their natural resources. It implies the extinction, as soon as the transfer of territory has taken place, of the competence and prerogatives of the former conceding authority and their replacement by the prerogatives of the new conceding authority, henceforth embodied in the successor State.

Draft article 10 does not approach the problem from the standpoint of *mineral rights* held by private individuals or companies, but is concerned rather with the rights exercised by the conceding authority.

20. The purpose of the four paragraphs of draft article 11 is to determine the treatment of State property in public enterprises, establishments and corporations.

Here again a distinction was drawn between the property of the predecessor State (in its enterprises, establishments and so forth) and property which belongs to the territory transmitted. The former pass to the successor State, which is subrogated to the rights, and also to the costs and obligations, pertaining thereto; the latter is not affected by the fact of the change of sovereignty.

Where the property of enterprises or establishments belonging to the territory or to the State is situated in parts of the territory falling within the jurisdiction of different sovereigns, the Special Rapporteur proposed that it should be apportioned equitably between the said parts, due regard being had to the viability of the parts and to the geographical location and origin of the property, and subject, where necessary, to equalization payments and offset.

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[9] *Ibid.*, p. 180, para. 4 of the commentary to article 7. (Italics supplied by the Special Rapporteur.)

[10] *Ibid.*, p. 183, para. 1 of the commentary to article 8.

[11] *Ibid.*, p. 184, para. 3 of the commentary to article 8.

[12] *Ibid.*, pp. 187-190, paras. 8-14 and 15-23 of the commentary to article 9.

21. *Provincial and municipal property* form the subject of draft article 12, which consists of the following four proposals:

(*a*) The change of sovereignty should, as a rule, leave intact the patrimonial property rights and interests of the provinces and municipalities transferred. Strictly speaking, this is not a question of State succession, but it becomes one by virtue of the fact that the property, rights and interests in question are henceforth to be governed by the juridical order of the successor State in the same way as the communities which own them;

(*b*) Where the change of sovereignty 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 former territorial authority are to be apportioned equitably between the new territorial authorities according to criteria of viability, with due regard to the geographical location and origin of the property, and subject, where necessary, to equalization payments and offset;

(*c*) The successor State is subrogated to the rights and obligations of its predecessor in respect of the latter's share in the property rights and interests of provinces and municipalities;

(*d*) Where there are two or more successor States, the said share of the predecessor State is to be apportioned equitably between them in accordance with criteria of equity, viability, and so on.

22. Draft article 13 dealt with the treatment of religious, charitable or cultural foundations, whose legal status is not affected by the territorial change unless it seriously conflicts with public policy in the successor State.

IV. Preliminary provisions included in the fourth report

23. After completing the first draft of the above-mentioned articles, the Special Rapporteur deemed it useful to precede them by various *preliminary provisions* which appear in his fourth report. He drew up four such provisions.

Article 1 raises the preliminary problem of the treatment of property in the event of *irregular acquisition of territory*.

In article 2 the Special Rapporteur attempted to state a rule on the *transfer of territory and of public property as they exist*, firstly by placing the successor State under a duty to assume the responsibilities and obligations corresponding to its rights of succession to public property and secondly by placing on the predecessor State the obligation to maintain the public property in good faith until the date of actual transmittal, the whole being determined in accordance with the municipal law applied in the transmitted territory up to that time.

Article 3 is concerned with the *date of transfer of property*, which in practice is not always the same as the date of transfer of the territory itself.

Article 4 deals with the *limitations by treaty* on the general principle of the transfer of State-owned public property.

24. These draft rules presented as preliminary provisions are not, of course, concerned solely with the succession of States in respect of matters other than treaties or, *a fortiori*, solely with succession to public property. The Special Rapporteur made a point of emphasizing this, particularly in his fourth report.[13] He accordingly submitted the draft rules with that reservation, since they are provisions common to several aspects of State succession, some of which fall within the competence of other special rapporteurs.

It is for the Commission to decide whether, in the last analysis, it seems wiser to plan to examine these and perhaps other articles at a later stage of its work, when sufficient progress has been made in exploring the various aspects of State succession.

25. The same observations could be made with regard, in particular, to the preliminary provision on the problem of irregular acquisition of territory, with the difference that, while deferred examination would be appropriate from the methodological standpoint, logically this provision nevertheless represents a problem preliminary to all or any succession. It is true that, in the study of State succession as in any other study, it is necessary to take a number of rules for granted, and to assume that certain conditions in other sectors of general international law are satisfied, from the outset. The Special Rapporteur nevertheless thought it appropriate that a provision in the form of an exception of "non-succession" in case of irregular transfers of territory should be included in that preliminary setting, even if the consideration of that provision had to be postponed or the drafting modified to take account of subsequent work.

26. A similar problem arose, for example, in connexion with the law of treaties when the Special Rapporteur on that subject, wishing to study the effect of the law of war on the law of treaties, thought of devoting a provision to the effect of hostilities on a treaty. It is true that he had to abandon that idea.

V. Proposed partial modifications of the third and fourth reports

27. The Special Rapporteur does not propose to adduce additional arguments, based on recent political events, in favour of retaining the draft article which states that "succession" cannot occur where there has been an irregular acquisition of territory. Recalling his previous reference to the Manchukuo case[14] as one example to be found among others, provided by history, the Special Rapporteur cannot resist the temptation to stress the exceptional merit and realism of a recent statement by the Japanese Minister for Foreign Affairs, Mr. Takeo Fukuda. Speaking before a commission of the Diet on 29 February 1972, the Minister expressed the view that Japan should candidly acknowledge the mistakes made in the past and offer its apologies to China, in particular with regard to

[13] *Ibid.*, p. 161, para. 3; p. 167, para. 2 of the commentary to article 2; and p. 170, para. 1 of the commentary to article 3.

[14] *Ibid.*, p. 163, paras. 8 and 9 of the commentary to article 1.

the occupation of Manchuria. "Such an acknowledgement of the facts", Mr. Fukuda said, "should make it possible to prepare the way for normalization. We should present our self-criticism and our apologies to China".[15] However, the Special Rapporteur does not intend to submit draft article 1 to the Commission as it stands.

28. He proposes that the article in question should be replaced by a more indirect formulation which could be fitted into the text at an appropriate place, for example in place of the present article 1 or as a new paragraph at the end for article 2, and could be considered at the Commission's convenience.

Such a formulation might read as follows:

The conditions for succession of States shall include respect for general international law and the provisions of the United Nations Charter concerning the territorial integrity of States and the right of peoples to self-determination.

29. With regard to the *definition of public property*, the Special Rapporteur has proposed a definition and a method for the determination of such property.[16] As the commentary indicates, the problems which arise in that connexion centre on three points: the definition of public property, the determination thereof and its transferability.

30. Having reflected further on article 5 and the variant 5 *bis*, which deal with the definition of public property, the Special Rapporteur would suggest that the Commission retain only the variant, since despite the wide sphere of application of article 5, the proposed definition does not cover all forms of public property. The Special Rapporteur fears article 5 does not cover certain categories of property which are indisputably public, such as those connected with the concept of "socialist property". Thus, for example, *property of a worker-managed enterprise* cannot be covered by the proposed article 5 for it inherently belongs neither to the State nor to a "territorial authority" or "public body" thereof.

31. The problem of the law to be used as a point of reference for the purpose of determining what constitutes public property has been the subject of lengthy commentary which the Special Rapporteur does not propose to recapitulate. Examination of the many precedents shows clearly that the law of the predecessor State is not always taken into consideration. The successor State itself has often defined, in exercise of its sovereign powers, the public property which it considers should be included in its patrimony. Accordingly, the reference to the law of the predecessor State in the proposed variant (article 5 *bis*), which is not consistent in every respect with the very diversified practice in this sphere, should be modified in order to conform more closely to reality.

32. The Special Rapporteur therefore proposes the following reformulations:

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 or which are necessary for the exercise of sovereignty by the successor State in the said territory.

33. This text, while allowing some scope for the application of the municipal law of the successor State in the determination of public property, omits the inherently ambigous and dangerous reference to the "public policy of the successor State", contained in paragraph 2 of the original draft article 5.

34. It should be remembered that the succession of States involves a transfer of property, which passes from the ownership of one State to that of another. Hence, the problem of the *transferability of property to a State* is to be distinguished from the problem of transferability to authorities or groups other than the State. The latter aspect should not fall within the scope of State succession *stricto sensu*. However, it cannot be left completely out of consideration for two reasons. The first is that property which does not pass into the patrimony of the successor State does at least pass within its "juridical order" or its domestic sphere of competence. The second is that the transfer does not always occur between public bodies and their counterparts, but brings into play treaty or other procedures and rules which usually involve two subjects of international law.

35. Accordingly, the dual problem of transferability of State property, on the one hand, and the amenability to jurisdiction of other public property in relation to the juridical order of the successor State, on the other hand, should be covered by a special provision which might read:

1. All other conditions being fulfilled, public or private property of the predecessor State shall pass within the patrimony of the successor State.

2. All other conditions being fulfilled, the property of authorities or bodies other than States shall pass within the juridical order of the successor State.

36. The purpose of the foregoing provision is to clarify the issue even if it is agreed that the situation referred to in the second paragraph falls exclusively within the competence of the internal public law of each State.

37. The general principle of the transfer of all public property belonging to the State was the subject of an article entitled "Property appertaining to sovereignty", which read as follows in the third and fourth reports:

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.

38. Having reconsidered the above draft article, the Special Rapporteur is afraid that in its present form it may pose a problem which he submits for the Commission's consideration. Contrary to the intention of the Special Rapporteur, paragraph 1 may give the impression that the sovereignty of the successor State would in some way be a continuation of that of the predecessor State,

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[15] R. Guillain, "Faisant son autocritique, le Japon se déclare prêt à reconnaître la Chine populaire", *Le Monde*, 1 March 1972, p. 1.

[16] *Yearbook of the International Law Commission, 1970*, vol. II, pp. 133-143, document A/CN.4/226, article 1 and commentary; and *ibid., 1971*, vol. II (Part One) p. 174, document A/CN.4/247 and Add.1, article 5 and 5 *bis* and commentary.

an interpretation which would have very important consequences for public debts and liabilities in general, for the validity of treaties, acquired rights, and so forth. The Special Rapporteur has expressed his views on these matters elsewhere.[17] To this problem is added another very real one, namely that no hard-and-fast criterion exists for the determination of "property appertaining to sovereignty".

39. The Special Rapporteur therefore proposes that reference should be made to the property "*necessary*" for "*the exercise*" of sovereignty rather than to property appertaining to sovereignty. The paragraph would thus read:

1. Property necessary for the exercise of sovereignty over the territory shall devolve, automatically and without compensation, to the successor State.

40. Such a formulation no doubt leaves unsolved the problem raised by the paragraph under study, to wit: (*a*) What property is necessary for the exercise of sovereignty and (*b*) what authority has the power to determine such property ? There is no precise answer to such questions in contemporary international law. Inevitably, recourse must be had to internal public law inasmuch as it would be difficult to avoid in all cases and at all times applying the public law of the successor State.

Indeed, it was for that reason that the proposed paragraph has been drafted in neutral language. There is no indication as to which State, the predecessor or the successor, would be used as a point of reference for the determination of the "property necessary for the exercise of sovereignty" over the territory.

41. It could be argued that the juridical order of the predecessor State should automatically be used to determine the property necessary for the exercise of sovereignty. If the successor State were to have a broader concept of the exercise of sovereignty, which required that property formerly regarded as unnecessary or non-determinant for this purpose should pass within its patrimony, logic would at least appear to require that the predecessor State should not be made to pay the price for the establishment of a different political and ideological régime or a different institutional model. The successor State should pay that price in order to express its *Weltanschauung*—its own "world view" and to assume ownership, in this instance with the payment of compensation or otherwise, of property other than that which was used for the exercise or the expression of the sovereignty of the predecessor State over the transferred territory.

42. There may be some doubts as to whether article 6, paragraph 2, should be retained in its present form. That paragraph was designed to meet the need for a form of wording which could cover all cases of succession. The *transferred territory* may be that of a State merging with others; a piece of frontier territory separated from a State and surrounded by another; an adjacent region made up of several municipalities; an overseas province or a former colony which has achieved independence; part of a dismembered State, the pieces of which have been divided among various other States, and so forth.

The territory transferred or affected by the change of sovereignty may have within it State public property which passes to the successor and also other public property: municipal property, in particular (but not exclusively) where the transferred territory consists of one or several municipalities; provincial property; property of public services or establishments; property of bodies falling within the jurisdiction of various authorities. An overseas colony or province may have possessed its own property in its capacity as a legal person under internal public law. The Special Rapporteur had all those situations in mind when he used the term "property of the territory itself" even though in cases involving the *creation of a State* (by decolonization, secession, dismemberment, partition or division, or otherwise) such "property of the territory itself" changes its status as a result of the supervening change and becomes *State* property belonging to the newly-created subject of international law.

43. In fact, this "property of the territory itself" in any event undergoes a change with regard to its legal status. Only a part of this phenomenon is covered by international law relating to succession, the remainder being covered by the internal public law of the successor State. The most that can be said in a formulation which aims at covering all situations is that this property falls within the "legal jurisdiction" or the domestic sphere of legal competence of the new State, which can or should mean either that it becomes the property of the transferred territory itself or that it becomes State property. In the latter case the property becomes State property either by the elevation of the territory to the status of a State or by virtue of a change in the status of such property at the national level as a result of the express will of the new sovereign. This case shows clearly the extent to which the summary formulation of a rule is liable to cover situations which sometimes appertain to international law and sometimes to municipal law according to the type of succession involved (succession by creation of a State or otherwise).

44. Do the foregoing considerations justify the deletion of the proposed article 6, paragraph 2? One of two situations must obtain after the change in sovereignty: the property either continues to belong to the territory itself (it is not radically affected by the change which has taken place and the case would therefore not fall within the scope of State succession), or it becomes State property (this would result either from the creation of a State or from an internal decision taken by the successor State subsequent to the change of sovereignty; this case, too, would be outside the scope of State succession, since in the former case the event occurs just prior to, and in the latter case just after, the change of sovereignty).

45. Above all, the purpose of paragraph 2 is to stress the fact that *the property in question cannot under any circumstances remain in the hands of the predecessor State.* Therein lies the sole value of paragraph 2. The Special Rapporteur cannot say whether that is sufficient to justify the retention of the paragraph. That is for the Commission to say.

[17] *Ibid., 1969*, vol. II, pp. 77-78, document A/CN.4/216/Rev.1, paras. 29-34.

VI. Addition to the commentaries contained in the third report

46. As regards article 14, which deals with public archives and libraries, the Commission is requested to refer to the commentaries contained in the third report.[18] In that connexion the Special Rapporteur would offer the following additional information:

Article 245 of the Treaty of Versailles laid upon Germany the obligation to restore to France the "trophies, archives, historical souvenirs or works of art . . . [and the] political papers" taken from a *château* belonging to the French Minister of State. Similarly, article 246 of the Treaty called upon Germany to restore to the King of the Hedjaz the "original Koran of the Caliph Othman, which was removed from Medina by the Turkish authorities and is stated to have been presented to the ex-Emperor William II".[19]

On the basis of article 247, Belgium obtained for the University of Louvain, "manuscripts, incunabula, printed books, maps and objects of collection corresponding in number and value to those destroyed in the burning by Germany of the Library of Louvain".[20] This is a case of compensation and not of restitution.

47. On the question of the basis for the obligation to return public archives, one writer [21] has stated:

> Everything which is part of the public domain in the annexed country must also become property of the public domain in the annexing State. This property is by nature imprescriptible, inalienable and intended to be used in the public interest. In France, as in most States, public archives are part of the public domain of the State, of its administrative divisions, of municipalities or of public establishments, of which they are the property. It therefore follows that the annexation of a State entails the handing over of archives . . .[22]

Later he goes on to say:

> Since the handing over of public archives of ceded territories is an obligatory consequence of annexation, it is not surprising that in a large number of treaties of annexation *the clause concerning this obligation does not appear. It is understood*: it results from the renunciation by the State ceding the territory of all its *rights* and *titles* thereto.* The meaning attached to these two words is *title* to occupy, to hold the country and exercise ownership over it and the *right* to administer it freely. As a corollary they impose on the dismembered State a dual obligation to leave the property in the public domain existing within the ceded territory to the new occupant and to *deliver to the latter all elements necessary or useful for the administration of the said territory.*

* Article 1 of the Treaty of Frankfurt.[23]

Disregarding everything that is outmoded in the terminology used by the author and in his justification of annexation, we would simply retain the customary principle that all public archives should be handed over as instruments of "administration" in the broadest sense of the term, irrespective of whether there is a general agreement and whether that agreement contains a special clause regulating this matter.

48. The handing over of public archives to the successor State is of course possible only to the extent that the State is incontestably the successor. In the event of unjustified annexation or military occupation of the territory, international law protects public archives in particular as it protects all cultural property in general and in a still broader perspective all the property of the annexed State.[24]

49. The Special Rapporteur is obliged to his colleague in the International Law Commission, Professor Tammes, for providing new information concerning archives claimed by Iceland from Denmark. It will be recalled [25] that these archives and parchments had been collected in Denmark by an Icelander who was Professor of History at the University of Copenhagen. Despite the fact that they were private property, duly bequeathed to an educational institution in Denmark, and did not relate to the history of the public authorities in Iceland, the principle of restitution had been recognized by Denmark in respect of these archives.

Among the 1,600 fragments and sheets which constitute the so-called Magnusson collection was a two-volume manuscript (the Flatey Book) written in the 14th century by two monks on the Island of Flatey, an integral part of Iceland, which traces the history of the kingdoms of Norway. The agreement reached ended a long and bitter controversy between the Danes and the Icelanders, who both felt strongly about this collection which is of the

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[18] *Ibid., 1970*, vol. II, pp. 152-161, document A/CN.4/226, commentary to article 7 [which became article 14 in the fourth report].

[19] The same article provided (not on the subject of archives but in regard to historic objects that "Within the same period Germany will hand over to His Britannic Majesty's Government the skull of the Sultan Mkwawa which was removed from the Protectorate of German East Africa and taken to Germany". (See E. Parkes, J. E. Field and R. C. Thompson, eds, *British and Foreign State Papers 1919*, vol. 112 (London, H. M. Stationery Office, 1922), pp. 121 *et seq.*)

[20] Under the same article Belgium also received the leaves of the triptych of the Mystic Lamb painted by the Van Eyck brothers (which at that time were in the Berlin Museum) as well as the leaves of the polyptych of the Last Supper painted by Dierick Bouts. Concerning the triptych of St. Ildefonse, painted by Rubens, and the Treasure of the Order of the Golden Fleece, see article 195 of the Treaty of St. Germain-en-Laye (*ibid.*, p. 400; *see also* the fourth report of the Special Rapporteur, *Yearbook of the International Law Commission, 1971*, vol. II (Part One), pp. 175-178), document A/CN.4/247 and Add.1, para. 10 of the commentary to article 5 and para. 3 of the commentary to article 6).

[21] L. Jacob, *La clause de livraison des archives publiques dans les traités d'annexion* (Paris, Giard et Brière, 1915) (Thesis).

[22] *Ibid.*, pp. 14-15.

[23] *Ibid.*, p. 17 (Italics supplied by the Special Rapporteur).

[24] See UNESCO's work on the protection of cultural property in the event of armed conflict and the two volumes published by UNESCO entitled *Information on the Implementation of The Convention for the Protection of Cultural Property in Case of Armed Conflict, The Hague 1954* (Paris, 1967 and 1970) (SHC/MD/1 and SHC/MD/6). Concerning the documents, manuscripts and treasures in the Monastery of St. Catherine, Mount Sinai, which is currently occupied by Israeli troops, see UNESCO document 84/EX/8; concerning other cultural property in the Middle East, see addenda 1-7 to that document.

[25] See *Yearbook of the International Law Commission, 1970*, vol. II, p. 156, document A/CN.4/226, para. 22 of the commentary to article 7.

greatest cultural and historical value to them. On 21 April 1971 the Danish authorities returned the Flatey Book and other documents; over the next twenty-five years the entire collection of documents will join the collection of Icelandic manuscripts at the Reykjavik Institute. At the time of the official handing-over ceremony, when the the first documents left the Royal Library at Copenhagen, the Library flew the flag at half-mast.[26]

[26] See A. E. Pederson, "Scandinavian sagas sail back to Iceland", *International Herald Tribune*, 23 April 1971, p. 16.