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Sixth 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

Topic:

Succession of States in respect of matters other than treaties

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SUCCESSION OF STATES IN RESPECT OF MATTERS OTHER THAN TREATIES

[Agenda item 3]

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Sixth 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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ABBREVIATIONS

I.C.J.	International Court of Justice
I.C.J. Reports	I.C.J., *Reports of Judgments, Advisory Opinions and Orders*
P.C.I.J.	Permanent Court of International Justice
P.C.I.J., Series A/B	P.C.I.J., *Judgments, Orders and Advisory Opinions*

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EXPLANATORY NOTE: ITALICS IN QUOTATIONS

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

Part One

Preliminary provisions relating to succession of States in respect of matters other than treaties

1. The following provisions relate to the whole field of "succession of States in respect of matters other than treaties" and should consequently precede consideration of succession of States in respect of public property. They are, of necessity, fragmentary and will be supplemented as the International Law Commission progresses in its work in the various fields under consideration.

2. *For the time being*, these preliminary provisions comprise the following articles:

Article 1. Scope of the present articles

The present articles apply to the effects of succession of States in respect of matters other than treaties.

Article 2. Cases of succession of States covered by the present articles

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

Article 3. Use of terms

For the purposes of the present articles:

(*a*) "Succession of States" means the replacement of one sovereignty by another with regard to its practical effects on the rights and obligations of each for the territory affected by the change of sovereignty;

(*b*) "Predecessor States" means the State which has been replaced by another State on the occurrence of a succession of States;

(*c*) "Successor State" means the State which has replaced another State on the occurrence of a succession of States.

Part Two

Draft articles on succession to public property

3. In his third,[1] fourth [2] and fifth [3] reports, the Special Rapporteur prepared a set of draft articles, with commentaries and observations, on succession of States in respect of public property.

4. Having reconsidered his draft and deemed it necessary to take into account the work of the International Law Commission in the field of succession of States in respect of treaties, he submits below the following draft articles:

I. PRELIMINARY PROVISIONS

Article 4. Sphere of application of the present articles

The present articles relate to the effects of succession of States in respect of public property.

Article 5. Definition and determination of public property

For the purposes of the present 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 affected by the change of sovereignty or which are necessary for the exercise of sovereignty by the successor State in the said territory.

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[1] *Yearbook ... 1970*, vol. II, p. 131, document A/CN.4/226.

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

[3] *Yearbook ... 1972*, vol. II, p. 61, document A/CN.4/259.

II. GENERAL PROVISIONS

Article 6. Transfer of public property as it exists

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

2. In accordance with the provisions of the present articles, public property shall be transferred to the successor State as it exists and with its legal status.

Article 7. Date of transfer of public property

Save where sovereignty 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

(*a*) occurs *de jure* through the ratification of devolution agreements, or

(*b*) is *effectively* carried out in cases where no agreement exists or reference is made in an agreement to the said effective date.

Article 8. General treatment of public property according to ownership

All other conditions established by the present articles being fulfilled.

(*a*) Public or private property *of the predecessor State* shall pass within the patrimony of the successor State;

(*b*) Public property of *authorities or bodies other than States* shall pass within the juridical order of the successor State;

(*c*) *Property of the territory* affected by the change of sovereignty shall pass within the juridical order of the successor State.

III. PROVISIONS COMMON TO ALL TYPES OF SUCCESSION OF STATES

Article 9. General principle of the transfer of all State property

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

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

1. For the purposes of the present article, the term "concession" means the act whereby the State confers, in the territory within its national jurisdiction, on a private enterprise, a person in private law or another State, the management of a public service or the exploitation of a natural resource.

2. Irrespective of the type of succession of States, the successor State shall replace the predecessor State in its rights of ownership of all public property covered by a concession in the territory affected by the change of sovereignty.

3. The existence of devolution agreements regulating the treatment to be accorded to concessions shall not affect the right of eminent domain of the State over public property and natural resources of its territory.

Article 11. Succession to public debt-claims

1. Irrespective of the type of succession of States, 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 the exercise of its sovereignty or of its activity in the territory concerned.

IV. PROVISIONS RELATING TO EACH TYPE OF SUCCESSION OF STATES

SECTION 1. PARTIAL TRANSFER OF TERRITORY

Article 12. Currency and the privilege of issue

1. The privilege of issue shall belong to the successor State throughout the transferred territory.

2. Currency, gold and foreign exchange reserves, and, in general, monetary tokens of all kinds circulating or stored in the territory shall pass to the successor State.

3. The assets of the central institution of issue in the predecessor State, including those allocated for the backing of issues for the territory transferred, shall be apportioned in proportion to the volume of currency circulating or held in the territory in question.

Article 13. Public funds and Treasury

1. Public funds, liquid or invested, belonging to the predecessor State and situated in the transferred territory, shall pass into the patrimony of the successor State.

2. Irrespective of where they are situated, public funds, liquid or invested, which are proper to the transferred territory shall continue to be allocated and to belong to the transferred territory.

3. Upon closure of the public accounts relating to Treasury operations in the transferred territory, 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.

Article 14. Archives and public libraries

1. Archives and public documents of every kind relating directly or belonging to the transferred territory, and public libraries of that territory shall, irrespective of where they are situated, follow the transferred territory.

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 or sovereignty of the successor State.

Article 15. Property situated outside the transferred territory

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

2. The ownership of property belonging to the predecessor State which is situated in a third State shall devolve to the successor State in the proportion indicated by the contribution of the transferred territory to the creation of such property.

SECTION 2. NEWLY INDEPENDENT STATES

Article 16. Currency and the privilege of issue

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

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

3. In consideration of the foregoing, the successor State shall assume responsibility for the exchange of the former monetary instruments, with all the legal consequences which the substitution of currency entails.

Article 17. Public funds and Treasury

1. Public funds, liquid or invested, which are proper to the territory that has become independent shall remain the property of that territory, irrespective of where they are situated.

2. Public funds of the predecessor State, liquid or invested, which are situated in the territory that has become independent shall pass into the patrimony of that territory.

3. The rights of the Treasury of the territory that has become independent shall not be affected by the change of sovereignty, vis-à-vis the predecessor State or otherwise.

4. The obligations of the Treasury of the territory that has become independent shall be assumed by that territory on such terms and in accordance with such rules as apply to succession to the public debt.

Article 18. Archives and public libraries

1. Archives and public documents of every kind relating directly or belonging to the territory that has become independent, and public libraries of that territory, shall, irrespective of where they are situated, be transferred to the newly independent State.

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

Article 19. Property situated outside the territory of the newly independent State

1. Public property proper to the territory that has become independent which is situated outside that territory shall remain its property upon its accession to independence.

2. Public property belonging to the predecessor State which is situated in a third State shall be apportioned between the predecessor State and the newly independent State proportionately to the latter's contribution to the creation of such property.

SECTION 3. UNITING OF STATES AND DISSOLUTION OF UNIONS

Article 20. Currency and the privilege of issue

1. The privilege of issue shall belong to the successor State throughout the territory of the union or of each State in the event of dissolution of the union.

2. In the event of dissolution of the union, the assets of the joint institution of issue shall be shared *pro parte* between the successor States, which in consideration of the foregoing shall assume responsibility for the obligations relating to the substitution of new currencies for the former currency.

Article 21. Public funds and Treasury

1. The union shall receive as its patrimony the public funds and Treasuries of each of its constituent States except where the degree of their integration in the union or treaty provisions allow each State to retain all or part of such property.

2. In the event of dissolution of the union, the public funds and Treasury of the union shall be apportioned equitably between its constituent States.

Article 22. Archives and public libraries

1. Except where otherwise specified in treaty provisions aimed at the establishment of a collection of common central archives, archives and public documents of every kind belonging to a State which unites with one or more other States, and its public libraries, shall remain its property.

2. In the event of dissolution, the central archives of the union and its libraries shall be placed in the charge of the successor State to which they relate most closely or apportioned between the successor States in accordance with any other criteria of equity.

Article 23. Property situated outside the territory of the union

1. Property situated outside the territory of the union and belonging to the constituent States shall, unless otherwise stipulated by treaty, become the property of the union.

2. Property of the union situated outside its territory shall, in the event of dissolution, be apportioned equitably between the successor States.

SECTION 4. DISAPPEARANCE OF A STATE THROUGH PARTITION OR ABSORPTION

Article 24. Currency and the privilege of issue

1. The privilege of issue shall belong to the successor State in the territory absorbed or the portion of territory allocated to it in the partition.

2. The successor State or States shall take over the assets of the institution of issue and shall assume its liabilities in proportion to the volume of currency in circulation or held in the territory in question.

Article 25. Public funds and Treasury

1. The successor State shall receive the public funds and the Treasury belonging to the absorbed State in their entirety, irrespective of where the assets in question are situated. It shall assume responsibility for the obligations relating thereto so far as the rules applying to succession to the public debt permit.

2. In the event of partition of a State among two or more pre-existing States, each of them shall succeed to a portion, which shall be determined by treaty, of the public funds and the Treasury.

Article 26. Archives and public libraries

1. Ownership of archives and public documents of every kind, and public libraries, belonging to the absorbed State shall be transferred to the successor State, irrespective of where such property is situated.

2. Archives and public documents of every kind, and public libraries, belonging to the State partitioned among two or more others shall be apportioned between the successor States with particular regard to the link existing between such property and the territory transferred to each State.

Article 27. Property situated outside the absorbed or partitioned territory

1. Subject to the application of the rules relating to recognition, ownership of all public property of the State that has disappeared which is situated outside its territory shall devolve to the successor State.

2. In the event of total dismemberment of a State in favour of two or more other pre-existing States, property situated outside the State that has disappeared shall be shared equitably among the successor States.

SECTION 5. SECESSION OR SEPARATION OF ONE OR MORE PARTS OF ONE OR MORE STATES

Article 28. Currency and the privilege of issue

1. The privilege of issue shall belong to the successor State throughout the detached territory or territories.

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

3. In consideration of the foregoing, the successor State shall assume responsibility for the exchange of the former monetary instruments, with all the legal consequences which this substitution of currency entails.

Article 29. Public funds and Treasury

1. Irrespective of their geographical location, public funds and Treasury which are proper to the detached territory shall not be affected by the change of sovereignty.

2. The State fortune—its public funds and Treasury assets—shall be apportioned between the predecessor State and the successor State, due regard being had to the criteria of viability of each of the States.

Article 30. Archives and public libraries

1. Archives and public documents of every kind relating directly or belonging to a territory which has become detached in order to form a separate State, and public libraries of that State, shall, irrespective of where they are situated, be transferred to that 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, at their request and at their expense, save where they affect the security or sovereignty of the successor State.

Article 31. Property situated outside the detached territory

1. Where a State comes into being as a result of the detachment of a part of the territory of one or more States, the ownership of public property belonging to the said constituent territory or territories which is situated outside their frontiers shall not be affected by such change or changes of sovereingty.

2. Public property belonging to the predecessor State which is situated in a third State shall become the property of the successor State in proportion to the contribution of the detached territory to the creation of such property.

V. PROVISIONS RELATING TO PUBLIC ESTABLISHMENTS

Article 32. Definition of public establishments

For the purposes of the present articles, "public establishments" means those bodies or enterprises which engage in an economic activity or provide a public service and which are of a public or public utility character.

Article 33. Public establishments of the transferred territory

Public establishments which belong entirely to the transferred territory shall not be affected by the mere fact of the change of sovereignty.

Article 34. Property of the State in public establishments

The successor State shall be automatically and fully subrogated to the patrimonial rights which the predecessor State possesses in public establishments situated in the transferred territory.

Article 35. Case of two or more successor States

Where there are two or more successor States, the patrimonial rights of the predecessor State in public establishments situated in the transferred territories shall be apportioned between the successor States in accordance with the criteria of geographical location, origin of the property and the viability of the said establishments, and subject, where necessary, to equalization payments and offset.

VI. PROVISIONS CONCERNING TERRITORIAL AUTHORITIES

Article 36. Definition of territorial authorities

Version A

For the purposes of the present articles, "territorial authority" means any administrative division of the territory of a State.

Version B

For the purposes of the present articles, "territorial authority" means any administrative division of the territory of a State which is characterized by its own territory, population and administrative authority but does not possess international legal personality.

Article 37. Public property proper to territorial authorities

Version A

The change of sovereignty shall leave intact the ownership of the patrimonial property, rights and interests proper to territorial authorities.

Version B

The change of sovereignty shall leave intact the ownership of the patrimonial property, rights and interests proper to territorial authorities, which shall be incorporated, in the same manner as the said autborities themselves, in the juridical order of the successor State.

Article 38. Property of the State in territorial authorities

1. The share of the predecessor State in the property, rights and interests of a territorial authority shall be transferred *ipso jure* to the successor State.

2. Where there are two or more successor States, the said share shall be apportioned between them, with due regard to the viability of the territorial authority, to the geographical location and origin of the property, and subject, where necessary, to equalization payments and offset.

Article 39. Divided territorial authorities

Where the change of sovereignty has the effect of dividing a territorial authority into two or more parts attached to two or more successor States, the patromonial 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, to the geographical location and origin of the property, and subject, where necessary, to equalization payments and offset.

VII. PROPERTY OF FOUNDATIONS

Article 40. Property of foundations

1. 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.

2. Where the predecessor State possessed a share in the patrimony of a foundation, that share shall be transferred to the successor State; where there are two or more successor States, it shall be apportioned equitably between them.

Part Three

Commentaries on the preliminary provisions on succession of States in respect of matters other than treaties

Article 1. Scope of the present articles

The present articles apply to the effects of succession of States in respect of matters other than treaties.

COMMENTARY

(1) This article, which corresponds to the one adopted by the Commission in the draft on succession of States in respect of treaties,[4] makes it possible to define the scope of the subject along the lines laid down in the first report by the Special Rapporteur [5] and in accordance with the instructions given to him by the Commission at its twentieth session.[6]

(2) It will be remembered that the Commission, at the Special Rapporteur's request, changed the title of his topic, which was originally entitled "Succession of States in respect of rights and duties resulting from sources other than treaties".

In paragraphs 19 to 21 of his first report, the Special Rapporteur had stated that the original title might make the subject impracticable because the word "treaty" was used in different ways, referring to *a subject matter of the law of succession* in the topic assigned to Sir Humphrey Waldock, and to an *instrument of that law* in the topic assigned to the second Special Rapporteur.

(3) The Commission agreed to take the same approach to both topics and consequently defined the topic assigned to the Special Rapporteur as "Succession in respect of matters other than treaties".

(4) This topic encompasses the succession of States in respect of public property, public debts, legislation, nationality, personal status, acquired rights, and so on. These subjects will be covered by the provisions of the present articles and future articles, based on State practice whether expressed in treaties or not, and on internal and international judicial practice.

The succession of States in respect of these subjects may have been regulated by *treaties* concluded between the predecessor State and the successor State, such agreements *being regarded* here as a *means or instrument of the law of succession*, although they may already have been considered as a *subject matter of the law of succession* in the topic considered by the Commission on the basis of the reports prepared by Sir Humphrey Waldock.

In other words, just as in the work relating to the latter reports the problem of "succession to treaties by treaties" has not been neglected, so in this report the question of "succession by treaties to public property, public debts and so on" will be encountered. The "devolution agreements" and any other relevant treaties regulating cases of succession of States in respect of these subjects will therefore be studied from the point of view of their *material content* and not from the point of view of their *formal and instrumental framework*.

(5) The problem of the validity of these instruments will be studied not from the standpoint of principle (this has already been done in the work on the law of succession of States in respect of treaties), but from the standpoint of its practical impact on public property, public debts and so on.

(6) With regard to territorial régimes, dealt with in articles 29 and 30 of the draft articles on succession of States in respect of treaties, the Special Rapporteur noted with interest the reaction of certain members of the Sixth Committee at the twenty-seventh session of the General Assembly:

> Certain representatives, who supported articles 29 and 30, doubted whether the Commission had solved the doctrinal issue involved. Should the rules in these articles be formulated in terms of the boundary or territorial régime resulting from the dispositive effects of a treaty or should they relate to succession in respect of the treaty itself? Articles 29 and 30 would seem to have been drafted from the standpoint that *the question was not the continuance in force of a treaty but that of the obligations and rights which devolved upon a successor State*,* but it could rightly be asked how, in legal theory, the rights and obligations of parties emanating from a certain treaty could be separated from the international instrument which had created those rights and obligations.
>
> The view was expressed that if the provisions were drafted in terms of the "régime", more than in terms of the "treaty", it would perhaps be more appropriate to include them in the future draft on the part of the topic relating to succession of States in respect of matters other than treaties.[7]

The Special Rapporteur will in due course take account of these suggestions, which reinforce the view he expressed in his first report when defining the scope of the subject he was to study.

Article 2. Cases of succession of States covered by the present articles

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

[4] For the text of the draft articles on succession of States in respect of treaties, see *Yearbook ... 1972*, vol. II, p. 230, document A/8710/Rev.1, chap. II, sect. C.

[5] *Yearbook ... 1968*, vol. II, p. 94, document A/CN.4/204.

[6] *Ibid.*, pp. 216 *et seq.*, document A/7209/Rev.1, paras. 45 *et seq.*

[7] *Official Records of the General Assembly, Twenty-seventh Session, Annexes*, agenda item 85, document A/8892, paras. 106 and 107.

COMMENTARY

(1) In his fourth report the Special Rapporteur suggested a draft article 1, accompanied by commentaries and worded as follows:

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.[8]

(2) The particularly heavy agenda at its twenty-third session made it impossible for the Commission to study the work of the various Special Rapporteurs, except for that of Mr. Abdullah El-Erian, which was accorded priority at the request of the General Assembly. The Special Rapporteur was, however, able to benefit at that session by a number of suggestions made by the officers of the Commission, to whom he is particularly grateful. The following year, he therefore submitted in his fifth report a reformulation of article 1, reading 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.[9]

(3) In his commentaries on this article, the Special Rapporteur stated that irrespective of the stage at which the Commission might wish, for reasons of convenience, to take up in one way or another the problem dealt with in that article, he felt that a provision of the type suggested would inevitably have to be included, since it represented a "problem preliminary to all or any succession".[10]

The subsequent work of the Commission on succession of States in respect of treaties has confirmed the Special Rapporteur in his opinion. Sir Humphrey Waldock put forward at the twenty-fourth session a draft article [11] embodying more or less the same ideas, for which two different versions were proposed, the first being based on article 73 of the Vienna Convention on the Law of Treaties.[12]

(4) The Special Rapporteur, abandoning the idea of submitting his own formulation, suggests that the Commission should eliminate the need for further discussion of the same problem by adopting forthwith, as a preliminary provision on succession of States in respect of matters other than treaties, the same provision which it put into final form at its twenty-fourth session as article 6 of the draft on succession in respect of treaties. This article reads as follows:

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

(5) The Special Rapporteur feels it would be a pity if the Commission were to forego adopting such an article for the subject-matter dealt with in this report merely because it has already been included in the draft articles on succession in respect of treaties.

Firstly, as the Commission itself points out in its commentary to article 6, in certain situations it is not enough to rely on the general presumption that the articles prepared by the Commission are to apply only to facts occurring and situations established in conformity with international law.

Thus, in its draft articles on the law of treaties the Commission included, among others, specific provisions on treaties procured by coercion and treaties which conflict with the norms of *jus cogens* as well as certain reservations in regard to the specific subjects of State responsibility, outbreak of hostilities and cases of aggression.[13]

(6) Secondly, contrary to the views expressed by some of its members, the Commission wisely preferred not to confine itself to discussing the need for such a provision only in the case of transfers of territory occurring in conformity with international law, considering quite rightly that "to specify the element of conformity with international law with reference to one category of succession of States might give rise to misunderstandings as to the position regarding that element in other categories of succession of States".[14] It is precisely the concern to avoid such misunderstandings with regard to succession in respect of matters other than treaties that makes it necessary to reproduce that article here. It would therefore seem particularly inappropriate to treat each of the two sets of draft articles differently.

(7) Thirdly, it has become more essential than ever to reproduce this article, for its provisions are not automatically applicable to succession in respect of matters other than treaties simply because it was included in the draft articles on succession in respect of treaties. Indeed, precisely the contrary could be argued, i.e. that omitting the article from one draft while including it in the other would necessarily mean that it was inapplicable to the former.

Furthermore, the draft articles on succession in respect of treaties, in both their form and their scope, may have an autonomous legal existence and a destiny different from that of the articles on succession in respect of matters other than treaties.

Finally, even if both drafts were to serve eventually as a basis for the conclusion of conventions on those subjects—as would be desirable (and as the Sixth Committee has already decided for the first set of articles according to its report [15])—it would be all the more advisable to include the same provision in the second report the same provision as has been included in the first, and *precisely because* it has been included in the first. The Commission

[8] *Yearbook...1971*, vol. II (Part One), p. 162, document A/CN.4/247 and Add.1.

[9] *Yearbook...1972*, vol. II, p. 66, document A/CN.4/259, para. 28.

[10] *Ibid.*, para. 25. See also paras. 26 and 27.

[11] *Ibid.*, p. 60, document A/CN.4/L.184.

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

[13] *Yearbook...1972*, vol. II, p. 236, document A/8710, Rev.1, chap. II, sect. C, para. 1 of the commentary to article 6.

[14] *Ibid.*, para. 2 of the commentary.

[15] *Official Records of the General Assembly, Twenty-seventh Session, Annexes*, agenda item 85, document A/8892, para. 50.

is, in any case, technically accustomed to such a practice. Furthermore, there are many cases in which a given provision has been reproduced word for word, when necessary, in a number of different conventions.[16]

(8) It should be noted, too, that the inclusion of article 2 in the present draft is not based on theoretical considerations alone. There is a substantial corpus of relevant practice and judicial decision, relating in particular to succession to public property, which the Special Rapporteur mentioned in his fourth report.[17]

Article 3. Use of terms

For the purposes of the present articles:

(*a*) "Succession of States" means the replacement of one sovereignty by another with regard to its practical effects on the rights and obligations of each for the territory affected by the change of sovereignty;

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

(*c*) "Successor State" means the State which has replaced another State on the occurrence of a succession of States.

COMMENTARY

A. *Definition of succession of States*

(1) It will be recalled that the concept of "succession of States" which emerged from the work of the International Law Commission reads as follows:

> . . . the expression "succession of States" is used throughout the articles to denote simply a change in the responsibility for the international relations of a territory, *thus leaving aside from the definition all questions of the rights and obligations as a legal incident of that change* *.[18]

(2) The Special Rapporteur is well aware that

> A natural enough tendency also manifests itself both among writers and in State practice to use the word "succession" as a convenient term to describe any assumption by a State of rights or obligations previously applicable with respect to territory which has passed under its sovereignty without any nice consideration of whether this is truly succession by operation of law or merely a voluntary arrangement of the States concerned.[19]

(3) The Special Rapporteur feels it would not have been impossible to work out a single definition of succession of States that would have been valid both for Sir Humphrey Waldock's draft and for his own. This view was shared by some members of the Commission.[20] In any case, the definition on which the Commission based its articles on succession of States in respect of treaties is inapplicable to the present draft. It is the "legal incidents" of the change of sovereignty, excluded from the first definition, which must necessarily be taken into consideration in the Special Rapporteur's draft.

(4) In turning from succession in respect of treaties to succession in respect of matters other than treaties, one passes from the *fact* of the simple replacement of one State by another in the responsibility for the international relations of a territory to the problem of the concrete content of the rights and obligations transferred *as a result of that fact* to the successor State in the various fields relating to public property, public debts, the status of the inhabitants and so forth. But in so doing, one must not completely lose sight of the original fact of the replacement of sovereignty which occasioned the transfer or exercise of given rights and obligations. This is the very thing which complicates the problems relating to succession of States.

(5) It is necessary—especially when the succession of States has not been regulated by treaty—to see what basic rules can be found to define the rights and obligations of each State concerned. Consequently, succession of States seems to be more than the replacement of one State by another in the responsibility for the international relations of a territory. That is why the Special Rapporteur suggests tentatively that succession of States should be taken to mean "the replacement of one sovereignty by another with regard to its practical effects on the rights and obligations of each for the territory affected by the change of sovereignty".

B. *Definition of the terms "predecessor State" and "successor State"*

(6) Here the Special Rapporteur has confined himself to reproducing the definitions adopted by the Commission on the suggestion of Sir Humphrey Waldock. He feels that they are acceptable in the context of his own draft and would spare the Commission further debate on these terms.

C. *Other terms used*

(7) Clearly, the present draft article 3 is incomplete if not embryonic and should include definitions of many more of the terms used. For the time being, the Special Rapporteur intends to leave this article in its present

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[16] For example, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (General Assembly resolution 2200 (XXI) of 16 December 1966) each contain an identical provision concerning the right of peoples to dispose of their natural resources.

[17] *Yearbook..1971*, vol. II (Part One), pp. 163 *et seq.*, document A/CN.4/247 and Add.1, commentary to article 1, especially paras. 11 (litigation between Haile Selassie and a cable and wireless company), 12 (case of the Franco-Ethiopian railway), 14 (restoration of Poland), 17 *et seq.* See also *Yearbook...1970*, vol. II, pp. 140-141, document A/CN.4/226, paras. 30-32 of the commentary to article 8, and *passim*.

[18] *Yearbook...1972*, vol. II, p. 226, document A/8710/Rev.1, para. 30. The Commission had previously decided not to adopt a general definition of succession, for at that stage of its work it considered that that seemed to be "a theoretical or academic matter which should be avoided" being "of an abstract nature and of doubtful utility" (*Yearbook...1968*, vol. II, p. 217, document A/7209/Rev.1, para. 48).

[19] *Yearbook...1972*, vol. II, p. 226, document A/8710/Rev.1, para. 28, and first report by Sir Humphrey Waldock (*Yearbook... 1968*, vol. II, p. 91, document A/CN.4/202, para. 3 of the commentary to article 1).

[20] See, for example, the statement by Mr. Ushakov (*Yearbook... 1972*, vol. I, p. 33, 1156th meeting, para. 14.

form and to complete it as the Commission proceeds with its work.

It will probably become necessary to regroup in article 3 the definitions of *public establishments* (at present the subject of article 32), *territorial authorities* (the subject of article 36) and perhaps public property itself (article 5), as well as the concept of concession (article 10, paragraph 1). In the interest of clarity, the Special Rapporteur will retain this somewhat fragmented approach, and will make the necessary rearrangements at a later stage of the Commission's work.

Part Four

Draft articles on succession to public property, with commentaries

INTRODUCTION

5. In taking up the topic of succession of States to public property in his third and fourth reports, 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.

6. 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 rights of the predecessor State to public property therefore pass *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*.

7. Viewed in this light, the theory of State succession would not apply to the right and obligations of the State in relation to public property. Once international law recognizes the validity of the 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.

8. 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 States uses to meet certain essential needs 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?

9. The Special Rapporteur has accordingly abstained from any purely theoretical study of this problem and of other problems which may arise from State succession to public property, and has confined himself to preparing draft articles in terms as specific as possible. Throughout his work he has tried to keep in mind a concern which may be expressed in the form of three questions: (1) What is *public property*? (Problems of defining and determining such property); (2) What is *transferable* 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?); (3) Is the *ownership* of the property transferred (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 a well)?

10. The draft articles proposed by the Special Rapporteur in his earlier work to cover succession to public property were based on a *uniform approach*. They were therefore designed to be applied indiscriminately to all types of State succession.

11. In the present study the Special Rapporteur feels obliged to take into account the new element introduced by the adoption in first reading by the International Law Commission of the draft articles on succession of States in respect of treaties, based on the reports of Sir Humphrey Waldock, and the consideration of that draft by the Sixth Committee of the United Nations General Assembly.

12. In order to make the work of the International Law Commission easier, the Special Rapporteur therefore plans to follow the method and approach used in preparing the rules concerning succession in respect of treaties, so far as that is compatible with the special features of his subject-matter. This approach clearly has advantages, for it will save the Commission time and make it possible to standardize the matter examined, through a more or less parallel approach. Thus, for example, some articles, which have already been adopted by the Commission and approved by the Sixth Committee, could, as appropriate, be included in the present draft. Similarly, despite its inadequacies, the classification of types of succession on which the Commission based its work could be used in this draft, since the Special Rapporteur is prepared to cast his articles in the mould with which the International Law Commission and the Sixth Committee are already familiar. He therefore intends to review his draft, taking an *analytical approach*.

13. However, this method clearly has its limits. First, the very concept of "succession" must be re-evaluated in the light of the meaning it must have in the area of research assigned to the Special Rapporteur. Moreover, although the close relationship established between treaty law and the law of State succession in respect of treaties proved to be very fruitful, this approach is naturally inapplicable in the case of the law of succession of States in respect of matters other than treaties.

14. On the other hand, as already indicated in all his previous reports, the Special Rapporteur feels that the principles of the Charter of the United Nations (and

in particular those relating to the right of peoples to self-determination and the right of peoples to dispose freely of their natural resources) must be fully expressed in the present draft, in the same way that those principles—or at least the principle of self-determination—were felicitously embodied in the articles on State succession in respect of treaties. In the case of succession to public property in particular, the right to self-determination (which in that case takes the form of the elementary principle of the *viability* of a new State), prompts the formulation of rules calling for the automatic transfer to the successor State of the property necessary for the exercise of sovereignty over the territory concerned.

15. The Special Rapporteur proposes the following provisional work plan:

Part I: Preliminary provisions

Part II: General provisions

Part III: Provisions common to all types of succession of States

Part IV: Provisions relating to each type of succession of States

(1) Partial transfer of territory

(2) Newly independent States

(3) Uniting of States and dissolution of unions

(4) Disappearance of a State through partition or absorption

(5) Secession or separation of one or more parts of one or more States

Part V: Provisions relating to public establishments

Part VI: Provisions concerning territorial authorities

Part VII: Property of foundations

Part VIII: Miscellaneous provisions

I. PRELIMINARY PROVISIONS

Article 4. Sphere of application of the present articles

The present articles relate to the effects of succession of States in respect of public property.

COMMENTARY

(1) There is little to be said about this draft article. It is not only useful, but so simple that comments are virtually unnecessary. The basic purpose of the article is to define the scope of the present articles: first, they deal with succession of *States* and not with succession of Governments or succession in international organizations, and second, they deal with *public property* and not other "subject-matters of the law of succession", such as public debts, legislation, the status of the inhabitants, acquired rights and so on, or with treaties, which have already been studied in another draft.

(2) This public property is not defined in the present article. It will be defined in the following article. However, the Special Rapporteur has not specified in the present article to which authority, State, territorial authority or public establishment this public property must belong. Consequently, the article does not refer only to public property *belonging to the State* but to all public property. The justification for this position taken by the Special Rapporteur will be found in article 5.

Article 5. Definition and determination of public property

For the purposes of the present 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 affected by the change of sovereignty, or which are necessary for the exercise of sovereignty by the successor State in the said territory.

COMMENTARY

A. *Public property*

(1) In this third report, the Special Rapporteur proposed a draft article 1 in two versions, providing both a *definition* and methods for *determining* public property. Such property was referred to as being property which is of a "public" character *because it belongs* to the State, a territorial authority or a public establishment or Corporation. The long commentary by the Special Rapporteur [21] stressed the fact: (*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 the determination of what constitutes public property by treaty or by international judicial decisions has its limits and does not resolve all problems; and (*c*) that whatever the circumstances, recourse to municipal law seems inevitable for such determination, 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.

(2) Since the Special Rapporteur found practice and judicial decisions somewhat contradictory, [22] he proposed that the determination of what constitutes 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 gave the reasons for this in paragraphs 9-13 of the commentary on article 1 (third report). However, as soon as the municipal law of the predecessor

[21] *Yearbook...1970*, vol. II, pp. 134-143, document A/CN.4/226, part two.

[22] Cf. particularly the case of the British Protestant mission hospitals in Madagascar (*ibid.*, p. 137, para. 18), the case of "*habous*" or "*waqf*" property in Algeria (*ibid.*, p. 138, para. 19), the case of the Central Rhodope forests (*ibid.*, p. 139, paras. 21-23), the case of the Italian *enti pubblici* in Libya (*ibid.*, paras. 24-25), the case of the property of the Order of Saint Maurice and St Lazarus on the Little Saint Bernard Pass (*ibid.*, para. 26), the Peter Pázmány University case (*ibid.*, p. 140, paras. 27-30), the Chorzów factory case (*ibid.*, pp. 141-142, paras. 31-35 and 36-42), the case of German settlers in Upper Silesia (*ibid.* pp. 142-143, paras. 43-45) and so on

State or of the territory affected by the change of sovereignty has performed its function of determining what constitutes public property, it of course gives way to the juridical order of the successor State. Once the property has been characterized for the purposes of transfer, the latter State reassumes its sovereign power to change the legal status of the property devolving to it, if it so desires.

By wording the draft article in this way, the Special Rapporteur left the question open for discussion by suggesting tentatively a solution that would make it possible to apply the legislation of the successor State rather than that of the predecessor State if the contrary course entailed a risk of serious conflict with public policy.

(3) Consequently, the Special Rapporteur proposed the two following alternative formulations:

Version A

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

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

Version B

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

(4) Pursuing his examination of this definition in his fourth report, in connexion with articles 5 and 5 *bis*, the Special Rapporteur explained that the suggested formulation was intended solely to define "*public property*", whether it belonged to the State, a territorial authority or a public enterprise. Another problem was to determine whether all the public property covered by the definition was *transferable* to the successor State. Indeed, that was precisely the problem to be settled in the draft articles which followed. Thus the definition and determination of public property was to open the way to drawing a distinction between the effective transfer of State property and merely placing public property under the sway of the juridical order of the successor State. [23]

(5) In his fifth report, [24] the Special Rapporteur suggested that the Commission should retain only the variant 5 *bis*, since despite the wide sphere of application of article 5, the proposed definition did not cover all forms of public property. The Special Rapporteur feared that article 5 did not cover certain categories of property which were indisputably public, such as those connected with the concept of "socialist property". Thus, for example, *property of a worker-managed enterprise* could not be covered by the proposed article 5 because it inherently belonged neither to the State, nor to a "territorial authority" or "public body" thereof.

(6) As recalled above,[25] the problem of the law to be used as point of reference for the purpose of determining what constitutes public property had been the subject of lengthy commentaries, which indicated that examination of the many precedents showed 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 proposed in the fourth report (article 5 *bis*), which is not consistent in every respect with the very diversified practice in this sphere, needed to be modified in order to conform more closely to reality.

(7) The Special Rapporteur therefore proposed a new formulation, which has been reproduced at the beginning of the present commentary, article 5 *bis* having become article 5 in the present numbering. 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 ambiguous and dangerous reference to the "public policy" of the successor State, contained in paragraph 2 of the first version of draft article 5 (fourth report).

(8) As the Special Rapporteur noted in his fourth report,[26] international lawyers have rarely concerned themselves with the definition of public property. They had occasion to do so when an attempt was made in article 56 of the Regulations annexed to the Hague Convention of 18 December 1907 respecting the Laws and Customs of War on Land to provide for a system of protection of "The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property".[27, 28]

Similarly, the Special Rapporteur noted the existence of an internationalist approach to the definition and determination of public property within the Reparation Commission established by the peace treaties of 1919.[29]

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[23] See the commentaries and the examples cited in the fourth report (*Yearbook...1971*, vol. II (Part One), pp. 174-175, document A/CN.4/247 and Add.1, paras. 1-5 of the commentary to article 5).

[24] *Yearbook...1972*, vol. II, p. 66, document A/CN.4/259, para. 30.

[25] See paras. 1 and 2 above.

[26] *Yearbook...1971*, vol. II, (Part One), p. 175, document A/CN.4/247 and Add.1, Part Two, para. 6 of the commentary to article 5.

[27] J. B. Scott, *The Hague Conventions and Declarations of 1899 and 1907* (New York, Oxford University Press, 1915), pp. 125-126.

[28] Max Huber ("La propriété publique en cas de guerre sur terre"), *Revue générale de droit international public* (Paris), vol. XX (1913), p. 680), sought to determine the legal status of the property "of local administrative organs occupying an intermediate place between municipalities and the central State administration", of "State establishments and foundations", and of "separate patrimonies, distinct from the general patrimony of the State", but the criteria he defined are not rigorous, and neither are the categories set out above.

[29] *Yearbook...1971*, vol. II (Part One), pp. 175-176, document A/CN.4/247 and Add.1, Part Two, paras. 8-12 of the commentary to article 5.

B. *Rights and interests*

(9) 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 person by an act or an abstention from an act, by the maintenance of or alteration in a situation.[30]

(10) 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 special section (part X, section IV) entitled "Property, rights and *interests* *" [31]

C. *Unliquidated claims and rights*

(11) A special aspect of the problem of determining what constitutes transferable public property is presented by the question of unliquidated claims and rights. Some theorists take the view that such claims can hardly be considered as "public property" capable of transfer to the successor State.[32] 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 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 products, 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.[33]

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

[31] G. F. de Martens, ed. *Nouveau Recueil général de traités* (Leipzig, Weicher, 1923), 3rd series, t. XI, p. 323. For English text, see *British and Foreign State Papers, 1919*, vol. 112 (London, H. M. Stationery Office, 1922), p. 146.

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

II. GENERAL PROVISIONS

Article 6. Transfer of public property as it exists

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

2. In accordance with the provisions of the present articles, public property shall be transferred to the successor State as it exists and with its legal status.

COMMENTARY

(1) The Special Rapporteur merely draws attention to commentary to article 2 in his fourth report. In the first version of article 2, in the fourth report, the two paragraphs proposed for article 6 above were separated by another paragraph which has been deleted—not without hesitation—from the present version.

(2) Furthermore, paragraph 2 of article 6 as proposed above has been modified slightly as compared with the first version given in the former article 2. The transferability of property as it exists and with its legal status is no longer accompanied by the restriction that that transfer must be compatible with the municipal law of the successor State.

Article 7. Date of transfer of public property

Save where sovereignty 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

(*a*) Occurs *de jure* through the ratification of devolution agreements, or

(*b*) *Effectively* carried out in cases where no agreement exists or reference is made in an agreement to the said effective date.

COMMENTARY

(1) With the exception of a few negligible drafting changes, the wording of article 7 above is the same as that of article 3 in the fourth report, and the Special Rapporteur therefore draws attention to his commentary on that article.

(2) It will be recalled that in the draft articles on succession of States in respect of treaties the Commission defined

[33] See below paras. 6 and 7 of the commentary to article 11.

the term "date of the succession of States" [34] in the following way:

"date of the succession of States" means the date upon which the successor State replaced the predecessor State in the responsibility for the international relations of the territory to which the succession of States relates. [35]

This definition itself is influenced by the definition of succession of States, which is considered to be the replacement of one State by another in the responsibility for the international relations of a territory.

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16. At this point a provision could be inserted dealing with limitations imposed by treaty on the principle of the general and gratuitous transfer of public property. In his fourth report, the Special Rapporteur included a draft article 4 worded as follows:

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.[35]

17. The Special Rapporteur feels he must refrain, for the time being, from submitting a special provision of this type.

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18. Similarly, he still hesitates to submit to the Commission an article concerning the fate of public property in cases where on the one hand a former treaty, containing all or part of the provisions relating to public property, was considered not binding on the successor State by the application of the articles on the succession of States in respect of treaties and on the other, where a devolution agreement concerning public property was considered invalid by application of the general rules of the law of treaties.

19. The Special Rapporteur considers it quite obvious that the obligations imposed on the predecessor State by international law and codified in the present articles are independent of the existence or validity of treaties. This is not to say that the States concerned cannot regulate the problem of the transfer of public property by treaty. But if the treaties or devolution agreements concerning that subject were considered inapplicable or invalid, it would be the "general law" of succession of States in matters other than treaties, as codified in the present articles, which would be applied. If, for example, the predecessor State had previously concluded a treaty which *had the effect of increasing its patrimony* in the territory subsequently affected by the succession of States, it cannot invoke the possible non-applicability of that treaty to the successor State to evade the obligation to transfer that property. Treaty law which is invalid or null and void must clearly give way to the "general law" of mandatory and gratuitous transfer.

[34] Used in draft articles 7 and 8, 10-15, 18 and 19, 21-23 and 25.

[35] Article 2, paragraph 1 (*e*).

Article 8. General treatment of public property according to ownership

All other conditions established by the present article being fulfilled,

(*a*) Public or private property of the predecessor State shall pass within the patrimony of the successor State;

(*b*) Public property of authorities or bodies other than States shall pass within the juridical order of the successor State;

(*c*) Property of the territory affected by the change of sovereignty shall pass within the juridical order of the successor State.

COMMENTARY

(1) The Special Rapporteur feels that the questions that may arise in connexion with article 8, which are situated at the confluence of the law relating to succession to public property, the law relating to succession to legislation and the municipal law of the successor State, are of fundamental importance. He has therefore submitted article 8 in an attempt to shed some light on these complicated questions, which are raised by the succession of States and can be noted in connexion with each rule. *This article does not represent in itself a basic rule, which could be said to be directly applicable.* It is not designed to indicate specifically which public property should be transferred to the successor State, for to that end, as indicated in the preamble to the article, "all other conditions established by the present articles [must be] fulfilled".

(2) Of course, not all the public and private property of the predecessor State passes within the patrimony of the successor State. Other conditions, set out throughout the present draft, must be fulfilled. The Special Rapporteur's aim in article 8 is simply to draw a clear distinction of principle between the problem of the *transferability of public property in full ownership* to the successor State, and that of the *patrimonial status quo* when the change of sovereignty does not affect the *ownership* of public property but alters its "legal status". Even so, the latter term is not appropriate if it seems to allude to the successor State's power—which is not at issue here—to maintain or modify, like any other State, the legislation applicable to the property whose ownership has not been affected by the change of sovereignty. What is at issue here is the fact that without any change in ownership or even any amendment to the law, the public property concerned passes within the sphere of competence of another sovereign on the occasion of the succession of States. This is what the Special Rapporteur wished to make clear by referring to another internal order, the juridical order of the successor State.

(3) Basically, there are only three categories of property, namely, those referred to in the three paragraphs of article 8, i.e. the public or private property of the State, the property belonging to territorial authorities or bodies other than States and lastly property belonging to the territory affected by the change of sovereignty itself.

Property in the first category must change owner and pass within the patrimony of the successor State, provided all other necessary conditions are fulfilled. This is not the case for the two other categories of property, which continue to belong to the territorial authority, the public body or the transferred territory. However, that property falls within the legal jurisdiction of the successor State, or in other words, is governed henceforth by a new juridical order. *Draft article 8 is designed solely to make that point clear.*

(4) In his fifth report,[36] the Special Rapporteur reverted to the problem of the transferability of public property *belonging to the State*, excluding other categories of public property. The latter property might seem to have nothing to do with the succession *of States stricto sensu*, but it cannot be left out completely, firstly because the property which does not pass within the patrimony of the successor State does at least pass within its sphere of competence, and secondly because 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 the predecessor State and the successor State.

(5) Writers rarely give any attention to property *proper* to the territory affected by the change of sovereignty. The amount of such property is, however, considerable. There is no territory which does not possess property of its own.

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

In legal systems which recognize the concept of the public and private domain of the State, the situation is not always simple. In former French Indo-China, for example, there were no less than eight different kinds of domain: (*a*) and (*b*) a "colonial" domain composed of the two domains, public and private, of the French State in Indo-China; (*c*) and (*d*) a "general" domain comprising the two domains, public and private, of the former Federation of the States of Indo-China; (*e*) and (*f*) "local domains" belonging to each protectorate or colony in the Federation (Tonkin, Annam, Cochin China, Cambodia, Laos) with distinctions between the public and private domain; (*g*) and (*h*) public and private domains belonging to the provincial, local and municipal authorities of each protectorate or colony in the Federation.[37]

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

However, while it seems obvious that this property should not devolve to the successor State[38] and that it remains the property of the territory ceded, it is equally clear that this does not amount to maintenance of the *status quo ante*. The property does not continue to be governed by the former law or to be subject to the former sovereignty. This, of course, is part of the broader problem of succession of States in respect of legislation. However, the point must be made here that public property owned by the ceded territory in its own rights continues to belong to it but follows the political and judicial destiny of the territory, which passes under another sovereignty. Such property will continue to be owned by the territory but will be governed by the legislation of the successor State. In other words, the public property belonging to the territory is not affected by the change of sovereignty so far as ownership is concerned, but it passes within the juridical order of the successor State.

(7) A resolution of the Institute of International Law laid down the same principle, stating that local corporate bodies retained the right of ownership over their property after territorial changes: "The territorial changes leave intact those patrimonial rights which were duly acquired before the change took place." The resolution stated "*These rules also apply to the patrimonial rights of municipalities or other corporate bodies belonging to the State which is affected by the territorial change.**" [39]

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

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[36] *Yearbook...1972*, vol. II, p. 66, document A/CN.4/259, paras. 34 and 35.

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

"all the immovable and movable assets of the Independent State, and in particular (1) the ownership of all lands belonging to its public or private domain... (2) shares and founder's shares... (3) all buildings, constructions, installations, plantations and properties whatsoever established or acquired by the Government..., movable property of every kind and livestock..., its ships and boats together with their equipment and its military arms equipment, (4) the ivory, rubber and other African products which are at present the property of the Independent State and the stores and other merchandise belonging to it".

G. F. de Martens, ed. *Nouveau Recueil général de traités* (Göttingen, Librairie Dieterich, 1896), 2nd series, t. XXI, p. 693). Public property was later divided into categories. Land, for example, formed one category—"State lands", which were in turn divided into land in the public domain, land in the private domain, land for which concessions had been granted and vacant land (Paulus, *op. cit.*, pp. 15 *et seq.*). However, there was never any generally accepted demarcation between the patrimony of the colony and that of the metropolitan country (*ibid.*, pp. 26 *et seq.*).

[38] Except in the case of the total disapearance of the predecessor State—in other words, when there is, *ex hypothesi*, no property of the territory itself distinct from the property of the State which has disappeared. The ceded territory is coextensive with the former territory.

[39] Paragraphs 3 and 4 of resolution II of the Institute of International Law adopted at its forty-fifth sessipn, held at Sienna from 17 to 26 April 1952 (*Annuaire de l'Institut de droit international, 1952, II* (Basel), pp. 475-476).

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

The Franco-Italian Conciliation Commission established under the Treaty of Peace with Italy of 10 February 1947 had to deal with a problem of this kind.[40] In this case the Commission, bound by the very clear wording of paragraph 1 of annex XIV to the Treaty,[41] which it had to interpret, went further than is suggested here and recognized the devolution to the successor State, *in full ownership*, of the property proper to the ceded territory. This property does not merely come *within the juridical order* of the successor State.

(10) The agent of the Italian Government had argued that:

When paragraph 1 states that the successor State shall receive, without payment, State and para-statal property (including the property of local agencies) within territory ceded, it is not—at least in the case of the property of local agencies—referring to succession of the State to the ownership of such property but to the property's incorporation into the juridical order of the successor State.[42]

(11) The Commission rejected that viewpoint, since

the main argument of the Italian Government conflicts with the very clear wording of paragraph 1: it is the successor State that shall receive, without payment, not only the State property but also the para-statal property, including *biens communaux*, within the territories ceded. It is the municipal legislation of the successor State that must determine the fate (final destination and juridical régime) of the property thus transferred, in the new State context into which the property has passed following the cession of the territory.[43, 44]

III. PROVISIONS COMMON TO ALL TYPES OF SUCCESSION OF STATES

Article 9. General principle of the transfer of all State property

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

COMMENTARY

(1) The Special Rapporteur embodied the general principle of the transfer of all State property in an article entitled "Property appertaining to sovereignty", which was worded 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.[45]

(2) The Special Rapporteur noted in his third report [46] that it was difficult to find a satisfactory expression to describe property of a public character, which, being linked to the *imperium* of the predecessor State over the territory, can obviously not remain the property of that State after the change of sovereignty, or, in other words, after the termination of that *imperium*. Much, if not all, of this property is referred to in some bodies of legislation as property in the "public domain". This expression is unknown in many legal systems, however, and its lack of universality makes it unsuitable for use in the draft article.

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

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

It may be said that property appertaining to sovereignty over the territory represents *the patrimonial aspect of the expression of the domestic sovereignty of the State*. It is true that this expression may differ from one political system to another, but it has the characteristic of covering everything that the State, in accordance

[40] 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.

[41] United Nations, *Treaty Series*, vol. 49, p. 225.

[42] United Nations, *Reports of International Arbitral Awards*, vol. XIII, *(op. cit.)*, pp. 512-513. Annex XIV, paragraph 1, stated that "The Successor State shall receive, without payment, Italian State and para-statal property within territory ceded...". (*ibid.*, p. 503).

[43] *Ibid.*, pp. 514-515.

[44] With regard to "property proper" to the territory, see also fifth report *(Yearbook...1972)*, vol. II, p. 67, document A/CN.4/259, paras. 42-45.

[45] *Yearbook...1970*, vol. II, p. 143, document A/CN.4/226, part two, article 2; and *Yearbook...1971*, vol. II (Part One), p. 177, document A/CN.4/247 and Add.1, Part Two, article 6.

[46] *Yearbook...1970*, vol. II, pp. 143-114, document A/CN.4/226, paras. 2-6 of the commentary to article 2.

with its own guiding philosophy, regards as a "strategic" activity which cannot be entrusted to a private person.

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

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

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

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

The French Minister for war wrote in 1876; [47]

> ... the right and duty to ensure the functioning of public services, to order, for example, major roadworks, waterworks or fortifications, and ownership of or eminent domain over such works which are an appurtenance of the public domain—this entire aggregate of duties and rights is, in the final analysis, *an attribute of sovereignty. This inseparable attribute of sovereignty moves with the sovereignty itself* * ...

(6) It was in order to take account of the fact 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* that the Special Rapporteur sought to avoid this distinction, which is, indeed, unknown to some national systems of law.[48]

(7) In his third report, the Special Rapporteur dealt at length with international practice relating to the devolution of public property appertaining to sovereignty over the territory.[49] This practice sanctions the principle that territory shall devolve automatically and without compensation, whatever the type of succession. The writers unanimously consider that the principle of the transfer of such property is mandatory, even if some of them, basing their views on the distinction between the "public domain" and the "private domain" of the State, make the transfer of property in the second category dependent on the payment of an indemnity to the predecessor State. The rule of general devolution goes back to the period when the patrimonial conception of the State prevailed in juridical systems where the patrimonial rights of the State were regarded as appurtenances of the territory.

(8) In his fourth report, the Special Rapporteur added some further commentaries on this principle of the transfer of property appertaining to sovereignty, that is, property allocated by the State to a public service or public utility, these two terms being interpreted in a broad sense.[50]

There may perhaps be other property which, although 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.

(9) Reverting to the question in his fifth report, [51] the Special Rapporteur expressed concern lest in its present form the draft article under condideration might pose a problem because of the ambiguity of the term "property appertaining to sovereignty". Contrary to the intention of the Special Rapporteur, that formulation might give the impression that the sovereignty of the successor State would in some way be a continuation of that of the predecessor State, 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.[52] To

[47] In a memorial in support of an appeal to the Conseil d'Etat (France, Conseil d'Etat, 28 April 1876, Ministre de la guerre *v.* Hallet et Cie., *Recueil des arrêts du Conseil d'Etat* (Paris, Marchal, Billard, 1876), 2nd series, vol. 46, p. 398, foot-note).

[48] The report of the Sixth Committee to the twenty-sixth session of the General Assembly (*Official Records of the General Assembly, Twenty-sixth Session, Annexes*, agenda item 88, document A/8537) states in paragraph 136 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". 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.

[49] *Yearbook...1970*, vol. II, pp. 144 *et seq.*, document A/CN.4/226, part two, paras. 7-23 of the commentary to article 2.

[50] *Yearbook...1971*, vol. II (Part One), pp. 177 *et seq.*, document A/CN.4/247 and Add.1, commentary to article 6.

[51] *Yearbook...1972*, vol. II, p. 66, document A/CN.4/259, para. 37 *et seq.*

[52] *Yearbook...1970*, vol. II, pp. 77-78, document A/CN.4/216/Rev.1, paras. 29-24.

this problem is added another very real one, namely that no hard and fast criterion exists for the determination of "property appertaining to sovereignty".

(10) 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 article would thus read:

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

Such a formulation no doubt leaves unsolved the problem of (*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 article has been drafted in neutral language. There is no indication as to which State, the predecessor or the successor, will be used as a point of reference for the determination of the "property necessary for the exercise of sovereignty" over the territory.

(11) 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 or 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.

(12) The concept of "property necessary for the exercise of sovereignty", as defined here, is somewhat similar to that sanctioned by international judicial decision, which concerns the transfer of *property belonging to local authorities* "*necessary for the viability*" of the local territorial authority concerned. For example, in a dispute concerning the apportionment of the property of local authorities whose territory had been divided by a new delimitation of the frontier between France and Italy, the Franco-Italian Conciliation Commission set up under the Peace Treaty with Italy of 10 February 1947, noted that:

... the Treaty of Peace did not reflect any *distinctions ... between the public domain and the private domain* * that might exist in the legislation of Italy or the State to which the territory is ceded. *However, the nature of the property and the economic use to which it is put have a certain effect on the apportionment.**

The apportionment must first of all be just and equitable. However, the Treaty of Peace does not confine itself to this reference to justice and equity, *but provides a more specific criterion for a whole category of municipal property* * and for what is generally the most important category.

The question may be left open whether the ... [Treaty] provides for two types of agreement ..., one kind apportioning the property of the public authorities concerned, the other ensuring "*the maintenance of the municipal services essential to the inhabitants*" * ... But, even if that were so, the *criterion of the maintenance of the municipal services necessary to the inhabitants should* a fortiori *play a decisive role* * when these services—as will usually be the case—are provided by property belonging to the municipality which must be apportioned. The apportionment should be carried out according to a *principle of utility*,* since in this case that principle must have seemed to the drafters of the Treaty the most compatible with justice and equity.[53]

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

1. For the purposes of the present article, the term "concession" means the act whereby the State confers, in the territory within its national jurisdiction, on a private enterprise, a person in private law or another State, the management of a public service or the exploitation of a natural resource.

2. Irrespective of the type of succession of States, the successor State shall replace the predecessor State in its rights of ownership of all public property covered by a concession in the territory affected by the change of sovereignty.

3. The existence of devolution agreements regulating the treatment to be accorded to concessions shall not affect the right of eminent domain of the State over public property and natural resources in its territory.

COMMENTARY

A. *Definition of a "concession"*

(1) The definition suggested above will probably be included in due course in article 3, which defines the terms used. In the meantime, certain simple components of the definition are set out below.

(2) The term "concession" can be interpreted in different ways.

(*a*) From the standpoint of the beneficiary, it can mean permission to manage a public service or the right to work mineral or mining deposits;

(*b*) From the standpoint of the conceding State, it can mean an act by which the public authorities grant to a private enterprise or a person in private law the right to undertake work of a public nature and to exploit natural resources or manage a public service.

No attempt will be made in the present article to deal with the complex of problems the successor State faces with regard to concessions granted by its predecessor. One aspect of these problems, which will not be dwelt on here, was taken up by the Special Rapporteur in his

[53] United Nations, *Reports of International Arbitral Awards*, vol. XIII *(op. cit.)*, p. 519.

second report, "Economic and financial acquired rights and State succession".[54]

In particular, the term "concession" will not be used here in the first sense, as defined above, that is, from the standpoint of the beneficiary of the concession. It is the fate of the *rights of the conceding State* in cases of State succession which will be analysed in the present articles, which, it should be remembered, relate to public property. Although it is true that, as the jurists Lyon-Caen and Renault have stated, the characteristic feature of a concession is the "juxtaposition of a contract and an act of sovereignty",[55] for the time being we shall not consider in this study the *contractual aspect* of the concession, which raises various problems relating to acquired rights. We shall deal solely with *the act of sovereignty* or, in other words, the rights of the conceding power and the treatment accorded to them in the case of territorial changes.

1. *A concession is an act of the public authorities*

(3) In the arbitral award of 3 September 1924 rendered in the German reparations case,[56] arbitrator Beichmann recalled in the following words the definition of the term "concession" given by the Reparations Commission:

> The Reparations Commission stated, in its letter of 7 January 1921, that it had "serious reasons for considering that the word 'concession' should be understood as encompassing all rights and privileges of an economic nature granted by the Government or the public authorities pursuant to special legislative or administrative measures taken by virtue of the sovereign executive powers vested in the competent authorities, irrespective of whether that right has been exercised and irrespective of whether its exercise constitutes an enterprise of public utility".[57]

Later, arbitrator Beichmann stated:

> The Reparations Commission, in a letter dated 27 April 1921, stated "the Commission interprets the word 'concession' as meaning a 'right' to operate an agricultural, mining, industrial or commercial enterprise or in a general sense as a right of an economic nature granted by the executive authority by a special legislative measure or by decree, by virtue of a power which is in principle discretionary and which consequently does not derive from the simple operation of the general law."[58]

(4) In its final conclusions, the Reparations Commission requested arbitrator Beichmann to:

> State that, according to the law:
>
> (*a*) The term any "concession", as used in Article 260, means the working of the concession as well as the title or subjective right to the concession;
>
> (*b*) The use of this term cannot be limited to concessions granted for the operation of a public utility undertaking;
>
> (*c*) It does not necessarily entail the granting to the concessionaire of privileges appertaining to the public power;
>
> (*d*) The granting of a concession does not necessarily depend upon the executive power acting in a discretionary manner;
>
> (*e*) For a concession in the sense in which that term is used in Article 260 to exist, it suffices that the State or one of its authorities has granted a right to a beneficiary in connexion with matters relating to the public or private domain of the State or its eminent domain;
>
> (*f*) Any act by which a third party obtains from the public authorities the right:
>
> To use permanently or temporarily part of the public or private domain belonging to the State or its administrative districts;
>
> To undertake public works for the purposes of a public service or a public utility undertaking;
>
> To begin and continue working property of any kind that the State has withdrawn from the régime of free competition or free appropriation and for the attribution of which it has reserved for itself a right of control and decision in the form of the granting of concessions;
>
> shall constitute a concession in the sense in which the term is used in Article 260.
>
> "Consequently to declare that the granting of the right to work the following, and the working thereof itself constitute concessions in the sense in which that term is used in Article 260:
>
> "(*a*) Coal mines, iron mines or other minerals or petroleum deposits in China, Bulgaria and Turkey;
>
> "(*b*) Coal mines, iron mines or other minerals in the territories ceded by Germany, and in the German colonies placed under mandate;
>
> "(*c*) Coal mines, iron mines and other minerals in Austria, Hungary, and the territories ceded by Austria and Hungary, and the petroleum deposits ceded before the promulgation of the Act of 11 May 1884, under the régime established by the Act of 1854;
>
> "(*d*) Common salt mines and deposits, potassium salts as mentioned in the Hungarian Act VII of 1911 and the deposits of mineral oils and gases as mentioned in the Hungarian Act VI of 1911;
>
> "(*e*) Coal mines, iron mines or other minerals in the crown lands, in Russia, and salt mines within the country itself."[59]

(5) The arbitrator decided that

> if the term "concession" is to be correctly used, . . . the right . . . to work the mine or deposit must have been granted to the beneficiary by an act of the public authority . . . . That act must be a special act referring to a specific beneficiary. An act, which for example, grants to the owners of the surface in general the right to all or some of the mineral wealth beneath their soil does not constitute a concession. On the other hand, the act need not necessarily be an act of the executive branch . . . . There is nothing to prevent it being an act of the legislature, provided it is of the special nature indicated above. That is merely a question of constitutional law which should not be accorded any importance in determining the meaning of the term "concession".[60]

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[54] *Yearbook...1969*, vol. II, p. 69, document A/CN.4/216/Rev.1.

[55] Cited by 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), p. 210, foot-note 241 *in fine*.

[56] Case of German reparations under article 260 of the Treaty of Versailles, *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 2145 *a*, (Paris, 1924) and United Nations, *Reports of International Arbitral Awards*, vol. I, (United Nations publication, Sales No. 1948.V.2), pp. 429-528.

[57] *Ibid.*, p. 469.

[58] *Ibid.*

[59] *Ibid.*, p. 470.

[60] *Ibid.*, pp. 473-474.

2. *A concession is an act granting permission to manage a public service or exploit a natural resource*

(6) The activities relating to management, exploitation or implementation in the domain of the State entrusted to a person in private law by the public authorities are usually temporary, or more precisely of limited duration, even when the concession instrument provides that they are to continue for a long period of time. Furthermore, such activities are usually distinguished by the fact that they exclude all property rights over the soil or subsoil of State territory.

Hence, the Beichmann award mentioned above states that "an act which, for example, grants to the owners of the surface in general the right to all or some of the mineral wealth beneath their soil does not constitute a concession".

(7) Resolution 530 (VI) of 29 January 1952, in which the General Assembly of the United Nations adopted "Economic and financial provisions relating to Eritrea", contains an article X defining a concession, which reads as follows:

Article X

1. In this article:

(*a*) "concession" means a grant by the former Italian administration or by the Administering Power or by a municipal authority of the enjoyment in Eritrea of specific rights and assets in exchange for specific obligations undertaken by the concessionaire with regard to the use and improvement of such assets, such grant being made in accordance with the laws, regulations and rules in force in Eritrea at the time of such grant."

3. *The concessionaire is a private person or enterprise or sometimes even a State*

(8) In a concession, the recipient and beneficiary of the act of the public power is generally a *person in private law*. But there are cases involving treaty rights enjoyed by certain States in the territory of one or more other States, that is, cases involving concessions *of which a State is the beneficiary*. According to a study by the United Nations Secretariat,[61] these cases involve mainly transit rights, mining rights, in connexion with the construction of international pipelines and water rights.

(9) *Transit rights*, which are granted under bilateral agreements following territorial changes, enable States to use their road or rail routes despite the fact that they cross territories which have become foreign territory as a result of boundary changes.[62]

A number of countries, mainly land-locked countries and countries which cannot, for reasons of climate or topography, make use of their own sea coasts or harbour facilities, enjoy *general transit rights* which constitute "an essential factor of sovereignty over natural resources if that sovereignty is interpreted to include the right freely to dispose of those resources or their derivative products".[63] For example, the treaties and conventions concerning the dissolution of the Swedish-Norwegian Union in 1905 include a Convention Regarding Transit Traffic,[64] which provides for the transportation of iron ore from northern Sweden to the Norwegian port of Narvik by the Lapland Railway. Similarly, Belgium and Northern Rhodesia respectively enjoyed transit rights through Angola and Mozambique for the exportation of copper ore from Katanga and Rhodesia.[65]

(10) Furthermore, States have often concluded agreements concerning *mining rights* granted by one in the territory of the other for the working of frontier deposits. As to *international pipelines*, there are many bilateral agreements for economic co-operation or defence purposes permitting one State to construct or operate such facilities in the territory of the other. *Water resources* common to two or more States are often the subject of inter-State arrangements covering the exploitation of such resources.

(11) Lastly, States may enjoy, in the territory of one or more other States, treaty rights laid down in multilateral agreements such as those establishing the European Communities, which involve acceptance by States of "restrictions of their sovereignty over certain natural resources in return for the possibility of realizing certain common ends and securing certain common benefits." [66]

B. "*Rights in respect of the authority to grant concessions*" *and their legal nature*

(12) The Special Rapporteur feels it is quite inappropriate to consider the successor State as "subrogated" to the rights of the predecessor State, or as "succeeding" to the latter with regard to its rights in respect of the authority to grant concessions. Similary, it would be erroneous to consider those rights as being "transferred" to the successor State. The phenomenon under consideration cannot be correctly described as subrogation, succession or transfer. All these legal concepts have the drawback of implying that the successor State exercises the *actual rights* of the predecessor State through subrogation, succession or transfer.

The Special Rapporteur believes, on the contrary, that the successor State exercises its own rights as a new conceding authority, which replaces the former conceding authority. The successor State acquires, by virtue of its

[61] *The Status of Permanent Sovereignty over Natural Wealth and Resources (Study by the Secretariat)* [referred to hereafter as "the Secretariat study"] *II. Report of the Commission on Permanent Sovereignty over Natural Resources* (United Nations publication, Sales No. 62.V.6).

[62] The Secretariat study gives many relevant examples: Czechoslovak and Polish railway lines which pass over short stretches of the other State's territory; the line between Aleppo (Syria) and Mosul (Iraq); the line between Niirala and Parikkala (Finland), which runs over some 85 miles of USSR territory; special arrangements relating to Greek and Turkish transit traffic on the railway line between Istanbul and Svilengrad (Bulgaria) and so on.

[63] Secretariat study, p. 76, para. 72.

[64] G. F. de Martens, ed., *Nouveau Recueil général des traités* (Leipzig, Dieterich, 1907), 2nd series, vol. XXXIV, pp. 708-710.

[65] Convention of 21 July 1927 between Belgium and Portugal, regarding the Katanga traffic through the Port of Lobito and the Benguela Railway (League of Nations, *Treaty Series*, vol. LXXI, p. 445). As is well known, Zambia is at present facing a critical problem as regards transit rights for its copper. The Secretariat study analyses other cases concerning other countries (see pp. 77-78, paras. 78-88).

[66] See the Secretariat study, pp. 80-87, paras. 111-167.

sovereignty, the title of owner of the soil and subsoil of the transferred territory.

(13) In one of his reports, the Secretary-General of the United Nations has stated:

Sovereignty over natural resources is inherent in the quality of statehood and is part and parcel of territorial sovereignty *—that is, "the power of a State to exercise supreme authority over all persons and things within its territory".[67, 68]

The Special Rapporteur considers that this conception of sovereignty is irreproachable and is bound to exclude any idea of subrogation, succession or transfer in the exercise of rights in respect of the authority to grant concessions. This problem is not made clearer by the formulation of treaty provisions, especially in devolution agreements.[69] It is clear, however, that contracting parties are concerned less with legal propriety than with adapting their respective rights and obligations to their own convenience.

(14) It might be objected that if the successor State possesses rights in respect of the authority to grant concessions not as a successor but as a State, those rights should fall outside the scope of a study of State succession. That is largely true and it seems *a priori* that the problem of concession should be excluded from the topic of State succession. Except for cases where the concession is granted to a State, the sovereign act authorizing the occupation and working of the public domain falls exclusively within the internal juridical order of the State.

In the Special Rapporteur's opinion, the question of rights in respect of the authority to grant concessions is not relevant to the study of succession of States in respect of legislation. The fact that the successor State "receives" the internal juridical order of its predecessor should not automatically imply that the concessionary régime is thereby renewed. More precisely, that fact is neither necessary nor sufficient, it is simply irrelevant. For as soon as the successor State is considered to be exercising *its own rights* in respect of the authority to grant concessions when it "takes over" existing concessions, the renewal or rejection of the legislation of the predecessor State clearly has no effect on the problem. The fact that concessions granted previously are taken into consideration is the result, not of the renewal of the municipal law of the predecessor State, but of the exercise of the rights of the new granting authority, in other words, the expression of the will of a new State.

[67] Here the Secretary-General is quoting L. Oppenheim, *International Law: A Treatise*. 8th ed. [Lauterpacht] (London, Longmans, Green, 1955), vol. I, p. 286.

[68] A/8058, para. 1.

[69] Paragraph 2 of the preamble to the "Declaration of Principles on Co-operation for the Development of the Wealth of the Saharan Subsoil" signed on 19 March 1962, states that "Algeria shall inherit the rights, prerogatives and obligations of France as a public power granting concessions in the Sahara, for the application of the mining and petroleum legislation..." (*Journal officiel de la République française, Lois et Décrets* (Paris), 20 March 1962, 94th Year, No. 67, p. 3026.)

C. *Obligations in respect of concessions, a question to be left pending*

(15) In fact, in the context of the present articles, which, it should be remembered, concern *public property*, the Special Rapporteur cannot take up the *problem of concessions* in all their aspects (some of which relate to the succession of States in respect of legislation, while others concern the questions of acquired rights and international responsibility). The concession contract gives rise not only to *rights* but also to *obligations*, and at a subsequent stage it will be necessary to specify the way in which succession of States influences the fate of those obligations. However, the Special Rapporteur is not concerned with this matter for the time being, and has singled out the aspect of the concession question relating to the *rights* (and not the obligations) of the *conceding authority*, which in his view automatically belong to the successor State as essential attributes of its sovereignty.

The article which the Special Rapporteur proposes for consideration by the Commission could have no other purpose, since it is concerned with public property. It simply recognizes the rights of the successor State without indicating, for the time being, how and to what end they should be exercised (maintenance or termination of the concession).

(16) It would be another thing entirely to specify the treatment which should be meted out to the concession as such, for to shift thus from the problem of the rights of the conceding authority to the obligations of the latter, would be to pass from the domain of public property, which is the subject of the present study, to that of contracts or concessions *stricto sensu*, and to that of acquired rights, which the Special Rapporteur will take up at a subsequent stage of his work. That is why he does not intend to study at the present stage the substantive questions relating to concessions, that is, making the maintenance of concessions dependent upon proof that they benefit the ceded territory, termination of "odious" concessions, termination of concessions granted *mala fide* and the question of royalties.[70]

(17) The Special Rapporteur considers, however, that the approach which has made it possible to define the rights of the conceding authority as not deriving from subrogation, succession or transfer will subsequently provide a basis for resolving the problem of *obligations*.

If the concession is the expression of a sovereign act of the public power, that is a voluntary commitment to an individual or a State which is the beneficiary of the concession, the International Law Commission knows how to approach this *commitment* or, in other words, this consent to be bound. No matter how a concession may differ in nature from a treaty (and they do not differ at all when the concession is granted in a treaty), it would be advisable to envisage applying to concessions, *mutatis mutandis*, the same rules adopted for treaties in the draft articles on succession of States in respect of treaties.

[70] However, Charles Rousseau, in particular, studies all these questions in the context of succession to public property. Cf. Rousseau, *op. cit.*, pp. 190-237.

Article 11. Succession to public debt-claims

1. Irrespective of the type of succession of States, 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 the exercise of its sovereignty or its activity in the territory concerned.

COMMENTARY

(1) Article 11 concerns one aspect of the question of *intangible property and rights*. Some general reflections on this category of property will be followed by commentaries relating specifically to article 11.

A. *Introduction*

(2) Article 11 and the following articles to some extent represent the *lex specialis* as opposed to the *lex generalis* laid down in article 9 above.

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".[71] 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".[72] 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".[73]

(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, and so on 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.[74]

(4) 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.[75]

Taking this as his starting point, Professor Guggenheim writes, 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 which *must* * be settled by agreement between the ceding State and the cessionary State.[76]

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 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 aginst 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.[77]

But 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." [78]

In the opinion of the Special Rapporteur, there is an *imperative obligation* to devolve all public property

[71] J. K. Bluntschli, *Le droit international codifié*, 5th ed. revised and augmented, translation into French by M. C. Lardy, 2nd ed. (Paris, Alcan, 1895), p. 85 (rule 54).

[72] *Ibid.*, p. 87 (rule 58), commentary to rule 58.

[73] *Ibid.*, p. 85, commentary to rule 54.

[74] A letter dated 5 September 1952, from Mr. D. L. Busk, British Ambassador to Ethiopia, to the Ehiopian Minister for Foreign Affairs, specified that "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 15 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 none the less expressive, indicating that the territory has to be transferred with all its financial machinery, as it previously existed (taxes, Customs, currency, Treasury) and operating normally.

[75] See *inter alia* P. Guggenheim: *Traité de droit international public*, 1st ed. (Geneva, Georg, 1953), pp. 467-468, note 2.

[76] *Ibid.*, pp. 468-469.

[77] *Ibid.*, p. 469.

[78] *Ibid.*, p. 468, note 2.

appertaining to sovereignty, more especially resources, debt-claims and public funds.[79]

B. *Patrimonial rights "defined by law"*

(6) The question here is whether all tangible 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.[80]

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 1 of the Convention between the United States and Denmark of 4 August 1916 concerning the cession of the Danish West Indies calls for the cession to the United States of "all territory, dominion and sovereignty, *possessed, asserted* or *claimed* * by Denmark." [81]

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.[82]

(7) 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.[83]

C. *Observations on article 11*

(8) In the opinion of the Special Rapporteur, the rule set out in this article is applicable to all types of succession of States. That is why he has placed this article in the part relating to common provisions. Consequently, he merely draws attention to the commentary in his fourth report.[84]

IV. PROVISIONS RELATING TO EACH TYPE OF SUCCESSION OF STATES

Introduction: Types considered

20. As recalled earlier, [85] the Special Rapporteur, in his third, fourth and fifth reports, submitted articles drafted on the basis of a uniform approach, designed to cover all possible types of succession. He does not know whether he succeeded in that task, but he is well aware of its complexity and of the risks involved.

21. It is likewise in order to facilitate the Commission's initial consideration of this subject that the Special Rapporteur is reverting to the analytical method, at the risk of undertaking a repetitive and fragmentary task and hence of drawing up a tedious catalogue, only to discover in the final analysis that a number of problems are solved in the same way, irrespective of the type of succession involved. There will always be time, however, to rearrange some of the articles at a later stage of the Commission's work.

22. There remains the problem of the number of cases of succession to be studied for that purpose. Here again, to facilitate the Commission's consideration of the draft, the Special Rapporteur intends to adopt, by and large, the distinctions suggested by Sir Humphrey Waldock and approved by the Commission in connexion with its study of the draft articles on succession of States in respect of treaties. As is well known, it was relatively easy (and ultimately more profitable) to base that study on the law of treaties, which is already more developed. It was definitely advantageous to approach the succession of States in respect of treaties through "channels" which were already familiar. *A priori*, one might expect it to be equally advantageous to link the current draft, which has not been codified, to another draft which has. That approach, however, clearly has its limitations.

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[79] 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".)

[80] See, for example, Supreme Court of Poland, Polish State Treasury *v.* Skibniewska (1928), in A. D. McNair and H. Lauterpacht, eds., *Annual Digest of Public International Law Cases, 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 Austria-Hungary) as including all claims as well.

[81] English text in *Supplement to the American Journal of International Law* (New York, 1917), vol. II, 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 the commentary to draft article 2, paragraph 2 (property in irregular possession), in the fourth report *(Yearbook...1971*, vol. II (Part One), pp. 168-169, document A/CN.4/247 and Add.1, Part Two, paras. 9-12 of the commentary to article 2).

[82] G. F. de Martens, ed., *Nouveau Recueil général de traités* (Göttingen, Dieterich, 1869), vol. XVII, part II, p. 56.

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

[84] *Yearbook...1971*, vol. II (Part One), pp. 185 *et seq.*, document A/CN.4/247 and Add.1, commentary to article 9.

[85] See paras. 10-12 above.

23. In any event, we shall study the cases of succession as defined in connexion with succession of States in respect of treaties, namely "(*a*) transfers of territory; (*b*) newly independent States; (*c*) the uniting of States, the dissolution of a State and the separation of part of a State".[86] Basically, these are the categories which will be studied, even if the nature of the material dealt with leads the Special Rapporteur to define these types of succession in a slightly different way.

24. The difficulty of selecting the right approach obviously derives from the dreadful complexity characteristic of the material relating to succession of States. It must be admitted that it also results from the fact that the same case of State succession can be defined in several different ways: the end of the Habsburg dynasty at the end of the First World War is simultaneously the *extinction of a State* (viewed from the angle of the *disappearance* of the Austro-Hungarian Empire), the *dismemberment* of a State (viewed from the same angle), the *dissolution* of a State or a *separation* of States (Austria and Hungary), and the emergence of *new States* (the parts of the territory of the Empire other than Hungary and Austria which became States or regained the status of *States*, such as Czechoslovakia and Poland). This extinction of the Austro-Hungarian Empire can also be regarded as the occasion for the *restoration* or *resurrection* of a State (Poland), or as a partition among existing States and new States (the latter being of two kinds, resuscitated States and territories which became States).

25. Although there are only too many options available when classifying a case of this type, there are other cases, which, on the contrary, cannot possibly be classified in a satisfactory way. The types of succession singled out by the Commission leave no scope for a historical consideration of cases of colonization. Similarly, another case of succession of States, which is likewise not an isolated one, will serve to demonstrate the limitations of the options available, despite the Commission's genuine effort to cover all cases. This is the handing over of the French Establishments in India to the Indian Union in 1954. This was not a partial transfer of territory from one State to another. Such an operation would imply that the territory was *detached* from one State and attached to another. However, the United Nations Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV), annex), specifies that the territory of an entity which is still dependent has a status separate and distinct from the territory of the colonial Power. It cannot be argued that the Declaration is not applicable to the case because it was adopted after the events of 1954.[87] Furthermore, this case does not concern a newly independent State, since the Establishments in question did not constitute a State. Similarly, one can obviously not refer to this event as a uniting of States or the dissolution of a union, since that would imply that the French Establishments in India had previously been States. Since they had not been States, they cannot be said to have been completely absorbed by another State, namely India. Lastly, this case cannot be classified as secession by the separation of part of the territory of a State, since it does not involve the detachment of territory or the creation of a new State.

26. Our task is complicated by a certain inconsistency in the definition of phenomena when they are approached for this purpose not from one angle (for example, from the angle of the predecessor State *or* that of the successor State), but from two angles indiscriminately and with a tendency to shift from one to the other without prior warning or limitation. It is doubtless this fact which prompted our former colleague, Professor Herbert Briggs, to say in 1963 that no two jurists described a case of succession in the same terms.

27. Which classification of the various types of State succession should we adopt?[88]

[86] *Yearbook...1972*, vol. II, p. 229, document A/8710/Rev.1, para. 45.

[87] Moreover, the Special Rapporteur believes, if he is not mistaken, that the French Establishments in India were not considered as forming part of "French territory" *stricto sensu*, even in French law.

[88] Some examples of the classifications adopted by various writers are given below: Bluntschli (*Le droit international codifié*, translated from German by Mr. C. Lardy, 2nd ed. (Paris, Guillaumin, 1874), pp. 76-84) considers four types: (*a*) the disappearance of States; (*b*) the cession of territory; (*c*) annexations and (*d*) the replacement of one State by others. The *Dictionnaire de la terminologie du droit international* (Paris Sirey, 1960, p. 587) defines "succession of States" by referring to four types of succession: (*a*) complete incorporation; (*b*) partial annexation; (*c*) partition and (*d*) creation of a new State. A. Bondé (*Traité élémentaire de droit international public* (Paris, Dalloz, 1926), pp. 114-128) considers (*a*) the transformation of the territorial composition of States through dismemberment or annexation and (*b*) the disappearance of States through dispersion, destruction of their territory, annexation to another State or incorporation. P. Fiore (*Il diritto internazionale codificato e la sua sanzione giuridica*, 5th ed., enl. (Turin, Unione tipografficо-Editrice torinese, 1915), pp. 151 *et seq.*) considers (*a*) separation from an established State; (*b*) restoration; (*c*) the State formed by the uniting of several other States; (*d*) complete annexation and (*e*) partial cession of territory. A. S. de Bustamante y Sirven (*Droit international public*, French translation by Paul Goulé, 1934-1939, (Paris, Sirey, vol. III, 1936), pp. 273-342) draws a distinction between "cases in which the affected State survives" (through (*a*) independence; (*b*) dismemberment and (*c*) partial annexation) and "succession proper, entailing the disappearance and extinction of the State", (through (*a*) absorption by another State, (*b*) disintegration or partition and (*c*) merger and union). F. Despagnet (*Cours de droit international public*, 3rd ed. (Paris, Larose et Tenin, 1905), pp. 98-118) draws a distinction between the extinction of States and cases involving changes in States, i.e. complete or partial annexation and the formation of a new State by separation. L. Cavaré (*Le droit international public positif*, 3rd. ed. (Paris, Pedone, 1967), vol. I, pp. 367-416) uses the following classification: (*a*) new States formed by detachment from another State; (*b*) changes in the territorial composition of the State as a result of enlargement or diminution (cession, annexation); (*c*) changes in the international legal constitution or international form of the State (diminution) of its personality when it becomes a member of a federation, a union of States or a real union, or becomes a protected State, and expansion of its personality in cases involving secession from a federation or confederation, the acquisition of unitary form by a federal State, and the disappearance of a protectorate). Charles G. Fenwick (*International Law*, 3rd ed. (New York, Appleton-Century-Crofts, 1948) draws a distinction between universal succession (absorption by annexation, absorption by incorporation into a federal union and division of one State into a number of separate States) and partial succession (partial annexation, independence of a State which was previously a protectorate or a member of a confederation). Max Sørensen

28. An attempt to clarify the matter would certainly be welcome. Hans Kelsen rightly tried to reduce the whole problem of classifying the succession of States [89] to the acquisition of a territory by the successor State and the loss of that territory by the predecessor State. This phenomenon of "acquisition-loss" may or may not be accompanied by the creation of a State or the disappearance of the predecessor State. In other words, according to Kelsen it involves:

1. *The acquisition of a territory*, i.e. a territory becomes the territory of a given State, either by being added to the territory of an existing State which thus becomes larger, or by becoming the territory of a State which did not previously exist and thus comes into being; and

2. *The loss of a territory*, i.e. a territory ceases to be part of the territory of a given State, either because the territorial domain of the latter has been reduced or, in cases involving the loss of all the territory of the State, because the latter has completely disappeared.[90]

In view of the foregoing, he formulates the following classification:

1. *Part* of the territory of one State becomes part of the territory of another State,

2. Or becomes a new State,

3. *The whole territory* of one State becomes *part* of another State,

4. Or is partitioned among several existing States,

5. Or becomes the territories of several new States,

6. Or becomes the territory of one new State.[91]

29. By following as closely as possible the classification adopted by the Commission, one could probably envisage, at least in the realm of pure logic, a double classification of cases of State succession *according to whether a new State was created and whether the predecessor State disappeared.* Each of these main categories would thus contain two subcategories, as follows:

(*a*) Succession without the creation or disappearance of a State (case of partial transfer of territory);

(*b*) Succession by creation of a State not entailing the disappearance of the predecessor State (case of newly-independent State);

(*c*) Succession by creation of a State and disappearance of the predecessor State or States (cases of uniting of States, dissolution of unions, merger, and creation of "composite" States);

(*d*) Succession without the creation of a State but entailing the disappearance of the predecessor (absorption, extinction, complete integration and partition among several States);

(*e*) Lastly, the special case of separation of part of a State (secession).

30. We shall now study each of these types separately.

A. *Succession without the creation or disappearance of a State (case of partial transfer of territory)*

31. The Commission considered "transfer of territory" in the draft on succession in respect of treaties. This involves cases of partial secession or annexation, the rectification of boundaries, the attachment of territory, and generally speaking the cases defined by the Commission as those "when territory under the sovereignty or administration of a State becomes part of another State" (article 10 of the Commission's draft). The commentary on that article states that the latter covers

> cases where territory not itself a State undergoes a change of sovereignty and the successor State is an already existing State. The article thus concerns cases which do not involve a union of States or merger of one State in another, and equally do not involve the emergence of a newly-independent State.[92]

32. The Special Rapporteur therefore finds it convenient to use this definition and the commentaries thereon, except that he prefers to describe the transfer of territory" as "partial" in order to distinguish it from cases involving a complete transfer of territory, which implies the disappearance of the predecessor State. Here, on the contrary, we are concerned exclusively with the partial transfer of territory, i.e. succession without the creation or disappearance of a State.

B. *Succession by creation of a State not entailing the disappearance of the predecessor State (case of newly-independent States)*

33. This type of succession was likewise singled out by the Commission; it involves the cases of so-called "accession to independence" or "decolonization". In fact, succession by the creation of a State not entailing the disappearance of the predecessor State covers a broader range of cases than those just mentioned, including *secession*, or *separation* through the detachment

(*Manual of Public International Law*, London, MacMillan, 1968) employs the following classification: (*a*) total absorption by complete annexation; (*b*) the disintegration of a State; (*c*) secession through rebellion; (*d*) cession of... territory and (*e*) the formation of federations or unions of States. D. P. O'Connell (*International Law*, 2nd ed. (Stevens, London, 1970), vol. I, p. 365) considers that territory can be transferred from one State to another in at least five ways (cession, annexation, emancipation or independence, union, federation). In these five cases one sovereignty replaces another, either wholly (complete annexation) or only partially. Oppenheim (*International Law: A Treatise*, 7th ed. [Lauterpacht], London, Longmans, Green, 1948), vol. I) draws a distinction between (*a*) universal succession (absorption, dismemberment) and (*b*) partial succession (independence, cession of territory, establishment of a federal State, accession of a protectorate to full sovereignty). K. Strupp "Les règles générales du droit de la paix", *Recueil des cours... 1934-I* (Paris, Sirey, 1934), pp. 255-595) distinguishes between: (*a*) secession-independence; (*b*) complete annexation; (*c*) entrance of a State into a federal union or its absorption into another State and (*d*) dismemberment, in which a whole series of States are established on the territory of another, which has disappeared as a result of revolutionary or other action (p. 473). He reduces all these phenomena to two categories, i.e. (*a*) complete extinction of a State and (*b*) partial changes (p. 474). Accioly (*Traité de droit international public*, French translation by Paul Goulé (Paris, Sirey, 1940), vol. 1, pp. 190-200) uses the following classification; (*a*) absorption or annexation of all or part of the territory of a State; (*b*) division or dismemberment of a State; (*c*) complete or partial extinction of a State (p. 191). He then goes on to consider the effects of each case, and classifies them as follows: (*a*) complete annexation; (*b*) merger; (*c*) partial annexation and (*d*) separation or dismemberment.

[89] Obviously, this problem does not concern cases of succession of *Governments*.

[90] H. Kelsen: "Théorie générale du droit international public — Problèmes choisis", *Recueil des cours..., 1932-IV* (Paris, Sirey, 1933), vol. 42, p. 315.

[91] *Ibid.*, pp. 315-316.

[92] *Yearbook...1972*, vol. II, p. 249, document A/8710/Rev.1, chap. II, C, para. 1 of the commentary to article 10.

of part of the territory of the State, whether unitary or not, and its emergence as a separate State.[93]

34. However, in order to follow as closely as possible the pattern laid down in the work already done by the Commission, and also in order to highlight the cases involving decolonization and to evaluate, in accordance with the repeated requests of the General Assembly, their contribution to the theory of State succession, the Special Rapporteur will consider under this heading only the cases of "newly-independent States", a term which he will continue to use.[94]

Consequently, he will use the definitions adopted in this connexion by the Commission in its draft on succession in respect of treaties. The term "newly-independent States" will have two meanings.

35. First, according to article 2, paragraph 1 (*f*)(entitled "Use of terms") of the Commission's draft, it "means a State the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible".

Similarly, it can also be used in the sense in which it is employed in the commentary on the same subparagraph of article 2, which states that " the definition includes any case of emergence to independence of a former dependent territory whatever its particular type may be" (colonies, trust territories, mandates, protectorates and so on).[95]

36. The Special Rapporteur fears, however, that he cannot subscribe to that part of the commentary which states that the expression "newly-independent State" signifies a State *which has arisen from a succession of States** in a territory...". The argument that the newly independent State *arises from a succession* is not flawless from the legal point of view. It is precisely the opposite which is correct—that is, the problems of succession arise from the creation of a newly-independent State.

37. Secondly, in accordance with article 25 of the Commission's draft on succession in respect of treaties, the definition also covers the case of a newly-independent State "formed from two or more territories, not already States when the succession occurred".[96]

38. The Commission seems to have considered in this context cases involving decolonization. However, the creation of a State without the disappearance of the predecessor State, which we are considering here, should naturally include, for example, the creation of Poland at the end of the First World War, from territories detached from Russia, Austria-Hungary and Germany. That, too, is a case involving the creation of a State which has, according to the aforementioned definition adopted by the Commission, been "formed from two or more territories, not already States when the succession occurred". The approach adopted by the Commission reduces the problem to cases of decolonization alone, and furthermore covers only the formation of a new State from territories which were themselves under the sovereignty of a single predecessor State, the former metropolitan country. The case of Poland shows that these territories may have been detached from several predecessor States. Following the Commission in this respect also, the Special Rapporteur will set this category aside for the time being and will merely touch upon it lightly.

C. *Succession by creation of a State and disappearance of the predecessor State or States (cases of uniting of States, dissolution of unions, merger and creation of "composite" States)*

39. This is the third category adopted in 1972 by the Commission in its draft articles on succession in respect of treaties. Here two or more successor States emerge from one predecessor State through the dissolution of a union, or, in *vice versa*, two or more predecessor States become a single successor State through the uniting of States.

40. For the purposes of these articles, the Special Rapporteur will take for granted the *definition of the uniting of States*, which according to article 26 of the 1972 draft covers the "uniting of two or more States in one State". The commentary on that article states that it "deals with a succession of States arising from the uniting in one State of two or more *States*, which had separate international personalities at the date of the succession",[97] which "involves therefore the disappearance of two or more sovereign States and, through their uniting, the creation of a new State".[98]

41. Similarly, the Special Rapporteur will retain the definition given in article 27 of the same draft, according

[93] This was also the view taken by Sir Humphrey Waldock in his third report (*Yearbook...1970*, vol. II, p. 27, document A/CN.4/224 and Add.1, para. 9) when he defined the term "*new State*" by referring to "a succession where a territory which previously formed part of an existing State has become an independent State".

[94] There is, of course, another reason for drawing a distinction between accession to independence and secession. The case of Belgium, which seceded from the Netherlands in 1830, should not be treated in the same way as the liberation of a colony. The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States already cited (see para. 25 above) indicates that the sovereignty of the metropolitan State does not extend to colonial territories (Cf. *Yearbook...1971*, vol. II (Part One), p. 166, document A/CN.4/247 and Add.1, Part Two, paras 20 and 31 of the Commentary to article 1, and in particular note 33, which states that owing to the "otherness" of the colonial territory, "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".

[95] *Yearbook...1972*, vol. II, p. 231, document A/8710/Rev. 1, chap. II, C, para. 6 of the commentary to article 2.

[96] This occurred, for example, in the case of the United Arab Emirates, the federations of Nigeria, Malaysia, Ghana, Somalia and Rhodesia-Nyasaland. See article 25 of the Commission's draft, and paragraph 1 of the commentary to that article (*ibid.*, p. 282).

The case of Ethiopia, which was annexed by Italy and liberated after the Second World War, is basically a case of decolonization. It is, however, difficult to consider Ethiopia as a "newly independent State", unless this term is considered applicable to a State which has regained its independence.

[97] *Ibid.*, p. 286, para. 1 of the commentary to article 26.

[98] *Ibid.*, para. 2 of the commentary to article 26.

to which *dissolution* occurs "when a State is dissolved and parts of its territory become individual States" [99] or "where parts of its territory become separate independent States and the original State ceases to exist".[100]

42. There is, however, one point which needs clarification: in this definition the Commission seems to be referring literally to the dissolution of *a State* and not to the disappearance of a union, thus running the risk of reducing the problem under consideration to that of the complete *dismemberment* of a *unitary* State which splits up and is replaced by new States established in each part of its territory. But the examples studied at length in the commentary indicate clearly that the article refers in fact to the dissolution of *unions*.[101] Moreover, "the Commission recognized that almost all the precedents of a disintegration of a State resulting in its extinction have concerned the dissolution of a so-called union of States".[102]

43. As to the *composite State*, which according to the International Law Association is "formed out of several previously separate *States or territories**",[103] is it clearer to draw a distinction between the State composed of two or more previously separate territories, which belongs in the category of newly-independent States examined under B above,[104] and the State formed out of two or more previously separate States, which belongs in the category of uniting of States, which is the subject of this section.

D. *Succession without the creation of a State but entailing the disappearance of the predecessor*

44. This category covers the case in which the predecessor State disappears, to the benefit of a pre-existing successor State (complete *absorption*, or *extinction* or *integration*) or of two or more pre-existing States (partition of one State among two or more others).[105]

45. The difference between this category and those examined under C above is obvious. The case in which the State disappears completely through *dismemberment* and *attachment* of each of its parts to pre-existing States must be carefully distinguished from that in which it disappears to the benefit of a new State, by merger or uniting, or to the benefit of two or more new States, by the establishment of such States in the various parts of its territory.

46. The Special Rapporteur for his part considers the cases envisaged in this hypothesis as being basically invalid in the light of contemporary international law, which prohibits the annexation, the partition or the absorption of a State by one or more others, even though cases of this sort do occur in practice, particularly in the course of armed conflicts.

47. The Commission will remember that in his fourth report the Special Rapporteur had already proposed a draft article 1 under which

> 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,

and

> The State which commits an act of conquest or annexation shall not be deemed to be a successor State . . .[106]

In the present report, he has recalled these comments by submitting a draft article 2 relating to the need to consider only cases of succession of States "occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations".

48. It will be for the Commission to decide whether this type of "succession without the creation of a State but entailing the disappearance of the predecessor", which the Special Rapporteur has included here solely with a view to complete coverage of the four types of succession logically conceivable, is to be finally retained.

E. *Special case of separation of part of a State (secession)*

49. In order to conform as closely as possible to the previous decisions and general approach of the Commission, the Special Rapporteur will deal separately with the case of separation of part of a State (secession). The Commission dealt separately with this case, for it did not want to confuse it with that of *newly-independent States*,[107] and therefore made it the subject of a special article (article 28) in the 1972 draft.

50. The Special Rapporteur will adopt the approach approved by the Commission in defining "separation of part of a State" or "secession": draft article 28 states that this occurs "if part of the territory of a State separates from it and becomes an individual State". The commentary on article 28 states that it is concerned "with the case where a part of the territory of a State separates from it and becomes itself an independent State, but the State from which it has sprung, the predecessor State, continues

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[99] *Ibid.*, p. 292.

[100] *Ibid.*, para. 1 of the commentary to article 27.

[101] Dissolution of Great Colombia, formed earlier by the uniting of New Grenada, Venezuela and Quito (Ecuador), dissolution of the union of Norway and Sweden in 1905, disappearance of the Austro-Hungarian Empire in 1918, dissolution of the union of Denmark and Iceland in 1944, dissolution of the United Arab Republic, the Mali Federation and so on.

[102] *Yearbook...1972*, vol. II, p. 295, document A/8710/Rev.1, chap. II, C, para. 12 of the commentary to article 27.

[103] International Law Association, *Report of the fifty-third Conference, Buenos Aires, 1968* (London, 1969), p. 600 (Interim Report of the Committee on the Succession of New States to the Treaties and Certain Other Obligations of their Predecessors), foot-note 2.

[104] See paras. 33 *et seq.* above.

[105] Of course, this category can be enlarged or complicated by including cases involving the disappearance of the predecessor State as a result of its partition—in the strict sense of the term—among pre-existing States, or among two or more territories of the same State which have become States, or among pre-existing States and new States.

[106] *Yearbook...1971*, vol. II (Part One), p. 162, document A/CN.4/247 and Add.1.

[107] See paras. 33 and 34 above.

its existence unchanged except for its diminished territory".[108]

51. The classification used for the present study, which is given below, will therefore be based as closely as possible on that approved by the Commission. It covers the following categories:

(*a*) Partial transfers of territory;

(*b*) Newly independent States;

(*c*) The uniting of States and the dissolution of unions

[These three categories were retained by the Commission];

(*d*) Disappearance of a State benefiting one or more pre-existing States;

[Category which the Special Rapporteur hopes will be abandoned by the Commission as being no longer in conformity with international law];

(*e*) Separation of part of a State (or of various parts of different States);

[Category dealt with separately by the Commission in a special article].

SECTION 1. PARTIAL TRANSFER OF TERRITORY

Article 12. Currency and the privilege of issue

1. The privilege of issue shall belong to the successor State throughout the transferred territory.

2. Currency, gold and foreign exchange reserves, and, in general, monetary tokens of all kinds circulating or stored in the territory shall pass to the successor State.

3. The assets of the central institution of issue in the predecessor State, including those allocated for the backing of issues for the transferred territory, shall be apportioned in proportion to the volume of currency circulating or held in the territory in question.

COMMENTARY

A. *Introduction*

(1) In all cases of succession of States, the problem of the currency can be reduced to that of redefining or equitably liquidating the juridical-financial relations between the holders of paper currency, successor States and predecessor States. State interventionism has long posed this problem in terms of the relations between the predecessor State and the successor State, but has not thereby eliminated the great technical complexities involved, with which, in the Special Rapporteur's opinion, the 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.*

(2) Instruments of payment generally consist of three kinds of monetary 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, and thirdly, the paper money or fiduciary currency, whose issue is generally entrusted to a State banking institution. The first two categories of monetary token pose the problem of a change of sovereignty in terms of succession to *public property*, while the third, poses the problem in terms of succession to *public debts.* Paper money, generally guaranteed by a gold backing, theoretically constitutes a debt owed by the institution of issue to the bearer of the fiduciary currency.

(3) The successor State may very well conserve the former currency. Its discretionary power can be expressed equally well by exercising its privilege of issue or by not exercising it. It may content itself with symbolic formal modifications (over-stamping, surcharges, new images) or with a change in the name of the former unit of currency, which is left in circulation. On the other hand, it may introduce a new currency in the transferred territory: this is usually the currency of the successor State itself in the case of a partial transfer of territory, or a new currency in cases involving the creation of a successor State. When the new currency is introduced, the successor State indicates the rate of exchange between that currency and the old currency.

(4) In order to illustrate the "public debt" aspect of the currency question, Max Huber once wrote:

> Since State bank-notes as a whole constitute a debt, the regular rules concerning the transfer of obligations are applicable. The bank-notes shall represent a claim against the same debtor, who retains all the backing. The situation with respect to bank-notes is the same as that of any holder of private paper payable to the bearer.[109]

Hence, it is not illogical to conclude that in so far as the new successor State replaces the former State in the transferred territory, taking over the obligations deriving from the circulation or holding of paper currency in the territory concerned, it is entitled to claim a corresponding portion of the assets and of the backing in gold or foreign exchange which guaranteed the fiduciary currency.

It should be noted that in the older types of succession metal currency was the main source of concern, while little attention was paid to the question of bank-notes, which were considered merely as commercial paper which would be liquidated without any intervention by the new sovereign.

[108] *Yearbook...1972*, vol. II, p. 296, document A/8710/Rev.1, chap. II, C, paragraph 1 of the commentary to article 28. (Secession of Belgium, which separated from the Netherlands in 1830), of Cuba, (which separated from Spain in 1898), of Panama, which separated from Colombia in 1903; of Finland, which separated from Russia after the First World War; creation of Czechoslovakia and Poland from the remains of the Austro-Hungarian Empire; secession of the Irish Free State in 1922; "partition" of Pakistan in 1947 (the Anglo-Indian agreements considered India as the existing State and Pakistan as the new State); secession of Bangladesh (which separated from Pakistan in 1972) and so on.

[109] M. Huber, *Die Staatensukzession: Völkerrechtliche und Staatsrechtliche Praxis im XIX. Jahrhundert* (Leipzig, Dunker und Umblot, 1898), p. 108.

B. *The privilege of issue*

(5) 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 only to the new sovereign in the transferred territory.

(6) 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 transferred territory 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,[110] so also it does not receive from the predecessor an attribute of sovereignty such as the privilege of issue. The paragraph simply states that the privilege of issue "belongs" to the new sovereign throughout the territory affected by the change. It is not *inherited.*

(7) As in the case of any right, however, a distinction must be drawn 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. Article 3 of the Convention between the United States of America and Denmark providing for the cession of the Danish West Indies reads as follows:

> 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.[111]

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.

(8) 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 then existed, would be accepted by the public treasury concurrently with the currency of Piedmont.[112] Article 77 of the treaty of peace with Turkey, signed at Sèvres on 10 August 1920,[113] 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.

(9) 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.

C. *Currency*

(10) 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.[114]

(11) The French Government withdrew its monetary tokens from the French Establishments in India but agreed to pay compensation. Article XXIII of the Franco-Indian Agreement of 21 October 1954 [115] stated: "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 of the currency withdrawn from circulation from the Establishments after the *de facto* transfer."

D. *Case of partial transfers of territory to various pre-existing successor States*

(12) This case involves a number of successor States, as a result of the transfer of several territories. The predecessor State may continue to exist, surrendering only part of its territory to be divided between two or more States.

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.).

(13) It must be borne in mind in this connexion that the transfer of this paper money to the new sovereign mainly represents *succession to a debt*, whereas the transfer of the bullion reserves represent a *succession to public property*. Thus the successor State usually tries to withdraw the old notes from circulation, both because they

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[110] See *Yearbook...1969*, vol. II, p. 77, document A/CN.4/216/Rev.1, para. 29.

[111] For reference, see note 81 above.

[112] Protocol of the Congress of Vienna, draft articles annexed to the Protocol of the meeting of 12 December 1814, in G. F. de Martens, ed. *Nouveau Recueil général de traités* (Göttingen, Dieterich, 1887), vol. II, p. 8.

[113] de Martens, ed., *Nouveau Recueil général de traités* (Leipzig, Weicher, 1924), 3rd series, vol. XII, p. 681.

[114] 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).

[115] English text in India, *Foreign Policy of India: Texts of Documents, 1947-64* (New Delhi, Lok Sabha (secretariat), 1966), p. 212. French text in France, Ministry of Foreign Affairs, *Recueil des traités et accords de la France, année 1962* (Paris, 1962), p. 535 and *Journal officiel de l'Inde française* (Pondicherry), 22 October 1954, No. 105, p. 567.

represent a debt and because this operation provides an opportunity to manifest its new sovereign power of issue.

With the disappearance of the old Tsarist empire after the First World War, some of its territories passed to Estonia, Latvia, Lithuania and Poland.[116] 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.[117] 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 devastation suffered by those countries during the war.[118]

(14) 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 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.

Article 13. Treasury and public funds

1. Public funds, liquid or invested, belonging to the predecessor State and situated in the transferred territory shall pass into the patrimony of the successor State.

2. Irrespective of where they are situated, public funds, liquid or invested, which are proper to the transferred territory shall continue to be allocated and to belong to the transferred territory.

3. Upon closure of the public accounts relating to Treasury operations in the transferred territory, 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) A distinction should be drawn between public funds belonging to the predecessor State and public funds which are proper to the transferred territory.

1. *State public funds*

(2) State public funds in the transferred territory must 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.

State public 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.[119]

(3) 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",[120] 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.

(4) 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 specifed 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.

(5) The Free Territory of Trieste succeeded to all Italy's movable assets, including public funds, under the 1947 Treaty of Peace.[121]

2. *Funds proper to the transferred territory*

(6) Public funds "proper" to the transferred territory 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 sovereignty over the territory.

(7) The utilization and ownership of funds proper to the transferred territory clearly cannot be affected by the change of sovereignty. The successor State undoubtedly has the power to terminate the application of the financial or other legislation of the predecessor State in the transferred territory and to replace it by its own regulations or any other regulations it may wish to draw up especially

[116] 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.

[117] See the following treaties: with Estonia of 2 February 1920, article 12; with Latvia of 11 August 1920, article 16; with Lithuania of 12 July 1920, article 12; and with Poland of 18 March 1921, article 19 (League of Nations, *Treaty Series*, vol. XI, p. 51; vol. II, p. 212; vol. III, p. 122 and vol. VI, p. 123).

[118] See B. Nolde, "La monnaie en droit international public", *Recueil des cours...1929-II* (Paris, Hachette, 1930), vol. 27, p. 295.

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

[120] "Betriebe, Anstalten und Fonds, *mit oder ohne eigene Rechtspersönlichkeit**", in the words of the Agreement of 13 April 1940 between Slovakia and the Reich, quoted by I. Paenson, "*Les conséquences financières de la successlon des Etats (1932-1953)*, (Paris, Domat-Montchrestien, 1954), p. 104.

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

for that territory. But any changes in the status of this public property would be the result of an act by the successor State acting in its capacity as a sovereign State, and would not be justified by the succession of States itself. This rule would seem to apply whatever the legal status or geographical location of this property, provided that the latter is proper to the transferred territory. The property may be situated in the territory itself, in the territory of the predecessor State or in that of a third State.

B. *Treasury*

(8) 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 installations 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*.

(9) The successor State also assumes, in respect of the transferred territory, any sums that may be due to the predecessor State if it has a debt-claim against the local Treasury or has granted it advances. However, all these matters must be studied in connexion with the public debt; the means of liquidating this debt will be considered by the International Law Commission at a later stage. 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.

(10) 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 Romania [122] 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.

Article 14. Archives and public libraries

1. Archives and public documents of every kind relating directly or belonging to the transferred territory, and public libraries of that territory, shall, irrespective of where they are situated, follow the transferred territory.

[122] G. F. de Martens, ed., *Nouveau Recueil général de traités*, (Leipzig, Weicher, 1921), 3rd series, vol. X, p. 856.

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 or sovereignty of the successor State.

COMMENTARY

(1) The Special Rapporteur has nothing to add to the comment given in his third report.[123]

A. *Definition of items affected by the transfer*

(2) Draft article 14 refers to "archives and public documents of every kind".

There does not exist—at least in French—any generic term capable of covering the great wealth of written, photographic or graphic material which the expression used is intended to suggest. It must be understood as a comprehensive expression referring to the ownership, type, character, category and nature of the items, and the article as finally formulated will have to be accompanied by a detailed commentary to provide the necessary explanations.

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

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

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

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

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

Lastly, the expression used is intended to cover all *varieties* of documents. It seemed to the Special Rapporteur unnecessary and pointless to enumerate all these varieties in a list which would necessarily be incomplete and would certainly be tedious. Examples of the wordings used in diplomatic instruments are "archives, registers, plans, title-deeds and documents of every kind";[124]

[123] *Yearbook...1970*, vol. II, p. 152, document A/CN.4/226, part two, paras. 1-6 of the commentary to article 7.

[124] This expression appears in several clauses of the Treaty of Versailles of 28 June 1919; part III, sect. I, article 38, concerning Germany and Belgium; sect. V, article 52, concerning Germany and France in respect of Alsace-Lorraine, *British and Foreign State Papers, 1919*, vol. 112 *(op. cit.)*, pp. 29-30 and 42).

"archives, documents and registers concerning the civil, military and judicial administration of the ceded territories";[125] "all title-deeds, plans, cadastral and other registers and papers";[126] "any government archives, records, papers or documents which relate to the cession or the rights and property of the inhabitants of the islands ceded";[127] "all archives having a general historic interest" as opposed to "archives which are of interest to the local administration";[128] "all documents exclusively referring to the sovereignty relinquished or ceded... the official archives and records, executive as well as judicial";[129] documents, deeds and archives... registers of births, marriages and deaths, land registers, cadastral documents..." [130] and so forth.

B. *The principle of the transfer of archives to the successor State*

(4) The principle of the transfer of archives to the successor State seems to be unquestioned. This is demonstrated by diplomatic practice.

1. *Archives of every kind*

(5) *Archives of every kind are generally handed over to the successor State immediately or within a very short time-limit.* The Franco-German Treaty of 1871 providing for transfer required the French Government to hand over to the German Government the archives relating to the ceded territories.[131] The Additional Agreement to that Treaty imposed on the two States the obligation to return to each other all the title-deeds, registers, and so forth, for municipalities on either side bounded by the new frontier line between the two countries.[132] After the First World War, the territories ceded in 1871 having changed hands again, the archives were dealt with in the same way and the Treaty of Versailles required the German Government to hand over without delay to the French Government the items relating to those territories.[133] Under the terms of an identically worded provision of the same Treaty, the German Government contracted the same obligation towards Belgium.[134]

2. *Archives as an instrument of evidence*

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

The writings of past years seem to retain the impress of this concern for "evidence". "Archives", wrote Fauchille, "and *titles to the property acquired by the annexing State* *, which form... part of the public domain, must also be handed over to it".[135] The Convention whereby the islands constituting the Danish West Indies were sold to the United States by Danemark in 1916 provided as follows: "In this cession shall also be included any government archives, records, papers or documents *which relate to the cession or the rights and property* * of the inhabitants of the islands ceded...".[136] When Spain, by the Treaty of Paris of 10 December 1898, ceded to the United States the property in the public domain of Cuba, Puerto Rico, the island of Guam and the Philippine archipelago, it was stated that the cession included "*all documents exclusively referring to the sovereignty relinquished or ceded... and such rights* * as the Crown of Spain and its authorities possess in respect of the official archives...".[137]

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

3. *Archives as an instrument of administration*

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

(8) One effect of this "practice" which is encountered in some treaties of annexation, especially in Europe, was that in a few rare cases the predecessor State considered itself entitled to hand over only archives of an administrative character [138] and to retain those which had a

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

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

[127] Article 1, para. 3 of the Convention between the United States of America and Denmark providing for the Cession of the Danish West Indies [for reference, see note 81 above].

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

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

[130] Article 8 of the Frontier Treaty between the Netherlands and the Federal Republic of Germany, signed at The Hague on 8 April 1960 (United Nations, *Treaty Series*, vol. 508, p. 154).

[131] Article 3 of the Treaty of Peace signed at Frankfurt on 10 May 1871 (see note 125 above).

[132] Article 8 of the Additional Agreement signed on 11 December 1871 (see note 126 above).

[133] Treaty of Versailles of 28 June 1919, part III, sect. V: Alsace-Lorraine, article 52 (see note 124 above).

[134] *Ibid.*, part III, sect. I, article 38.

[135] P. Fauchille, *Traité de droit international public*, 8th edition of the Manuel de droit international public de H. Bonfils (Paris, Rousseau, 1922), vol. 1, p. 360. para. 219.

[136] Aritcle 1, paragraph 3, of the Convention of 4 August 1916 (see note 81 above).

[137] Article VIII of the Treaty of 10 December 1898 (see note 129 above).

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

historical interest. However, such instances seem to be isolated ones.

There have been many examples of transfers of archives including historical documents. In some cases, indeed, only this latter category is referred to, not because it may at one time have been excluded from such transfers but simply because the tribulations of international life had not yet drawn attention to it. For instance, France, as the successor State in Savoy and Nice, was able not only to obtain from the Sardinian Government the historical archives which were in the ceded territories at the time but also, a century later, to obtain from Italy [139] the historical archives at Turin.[140] Similary, Yugoslavia and Czechoslovakia obtained from Hungary, by the Treaty of Peace of 1947, all historical archives which had come into being under the Hungarian monarchy between 1848 and 1919 in those territories. Under the same Treaty, Yugoslavia was also to receive from Hungary the archives concerning Illyria, which dated from the eighteenth century.[141] It is easy to find many more examples relating to this point.

Thus, it seems reasonable to lay down as a general rule for all types of succession the principle of the transfer of *archives of every kind* to the successor State.

However, the draft article makes another specification which requires commentary. It refers to archives "relating... or belonging to the territory".

C. *The archives-territory link*

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

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

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

(11) Secondly, the organic link between the territory and the archives relating to it must be taken into account. However, a difficulty arises when the strength of this link has to be appraised by category of archives. Writers agree that, where the documents in question "relate to the predecessor State as such and refer only incidentally to the ceded territory", they "remain the property of the ceding State, [but] it is generally accepted that copies will be supplied to the annexing State at its request".[142] The "archives-territory" link was specifically taken into account in the Rome Agreement of 23 December 1950 between Yugoslavia and Italy concerning archives.[143]

Attention may be drawn at this point to the decision of the Franco-Italian Conciliation Commission in which the Commission held that archives and historical documents, even if they belonged to a municipality whose territory was divided by the new frontier drawn up in the Treaty of Peace with Italy, must be assigned in their entirety to France whenever they related to the territory ceded.[144]

(12) After the Franco-German war of 1870, the archives of Alsace-Lorraine were handed over to the new German authority in the territory. However, the problem of the archives of the Strasbourg educational district and of its schools was amicably settled by means of a special convention. In this case, however, the criterion of the "archives-territory" link was applied only in the case of documents considered to be "of secondary interest to the German Government".[145]

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

D. *Archives situated outside the territory*

(14) The text suggested by the Special Rapporteur is of a general nature. According to the wording submitted for discussion, the successor State has the right to claim its archives, wherever they may be situated. In fact, the formulation of such a rule seems to follow inevitably

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

[140] See para. 21 below.

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

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

[143] Article 6 of the Agreement (United Nations, *Treaty Series*, vol. 171, p. 291) provides that Archives which are indivisible or of common interest to both parties "shall be assigned to that Party which, in the Commission's judgement, is more interested in the possession of the documents in question, *according to the extent of the territory or the number of persons, institutions or companies to which these documents relate.*† In this case, the other Party shall receive a copy of such documents, which shall be handed over to it by the Party holding the original".

[144] Decision No. 163 rendered on 9 October 1953 (United Nations, *Reports of International Arbitral Awards*, vol. XIII, *(op. cit.)*, pp. 503-549). This decision includes the following passage: "Communal property which shall be so apportioned pursuant to paragraph 18 [of annex XIV to the Treaty of Peace with Italy] should be deemed not to include, all relevant archives and documents of an administrative character or historical value'; such archives and documents, even if they belong to a municipality whose territory is divided by a frontier established under the terms of the Treaty, pass to what is termed the successor State *if they concern the territory ceded or relate to property transferred* (annex XIV, para. 1); if these conditions are not fulfilled, they are not liable either to transfer under paragraph 1 or to apportionment under paragraph 18, but remain the property of the Italian municipality. *What is decisive, in the case of property in a special category of this kind, is the notional link with other property or with a territory*" † (*ibid.*, pp. 516-517).

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

from a consideration of practice, some examples of which will be given below.

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

1. *Archives which have been removed*

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

There is a striking similarity in the wording of the instruments which terminated the wars of 1870 and 1914. Article 3 of the Treaty of Peace between France and Germany signed at Frankfurt on 10 May 1871 provided as follows: "If any of these items [archives, documents, registers, etc.] have been removed, they will be restored by the French Government on the demand of the German Government".[146] This statement of the principle that archives which have been removed must be returned was later incorporated, in the same wording, in article 52 of the Treaty of Versailles, the only difference being that in that treaty it was Germany that was compelled to obey the law of which it had heartily approved when it was the victor.[147]

(16) Similar considerations prevailed in the relations between Italy and Yugoslavia. Italy was to restore to the latter administrative archives relating to the territories ceded to Yugoslavia under the treaties signed in Rapallo on 12 November 1920 and in Rome on 27 January 1924 which had been removed by Italy between 4 November 1918 and 2 March 1924 as the result of the Italian occupation, and also deeds, documents, registers and the like belonging to those territories which had been removed by the Italian Armistice Mission operating in Vienna after the First World War.[148] The agreement between Italy and Yugoslavia of 23 December 1950 is even more specific: article 1 provides for the delivery to Yugoslavia of all archives "which are in the possession, *or which will come into the possession* * of the Italian State, of local authorities, of public institutions and publicly-owned companies and associations" and adds that "should the material referred to *not be in Italy*, * the Italian Government shall endeavour to recover and deliver it to the Yugoslav Government".[149]

(17) However, some French writers of an earlier era seemed for a time to accept a contrary rule. Referring to partial annexation, which in those days was the most common type of State succession, owing to the frequent changes in the political map of Europe, Despagnet wrote: "The dismembered State retains... archives relating to the ceded territory which are preserved in a repository situated outside that territory".[150] Fauchille did not go so far as to support this contrary rule, but implied that distinctions could be drawn: if the archives are outside the territory affected by the change of sovereignty, exactly which of them must the dismembered State give up? As Fauchille put it: "Should it hand over only those documents that will provide the annexing Power with a means of administering the region, or should it also hand over documents of a purely historical nature?"[151]

(18) The fact is that these writers hesitated to support the generally accepted rule, and even went so far as to formulate a contrary rule, because they accorded excessive weight to a court decision which was not only an isolated instance but bore the stamp of the political circumstances of the time. This was a judgement rendered by the Court of Nancy on 16 May 1896, after Germany had annexed Alsace-Lorraine, ruling that "the French State, which prior to 1871 had an imprescriptible and inalienable right of ownership over all these archives, *was in no way divested of that right by the change of nationality imposed on* * a part of its territory".[152] It should be noted that the main purpose in this case was not to deny Germany (which was not a party to the proceedings) a right to the archives belonging to the territories under its control at that time, but to deprive an individual of public archives which were improperly in his possession.[153] Hence the scope of this isolated decision, which appeared to leave to France the right to claim from individuals archives which should or which might fall to Germany, seems to be somewhat limited.

(19) The Special Rapporteur has nevertheless mentioned this isolated school of thought because it seemed to prevail, at least for some time and in some cases, in French diplomatic practice. If we are to give credence to one interpretation of the texts at least, this practice seems to indicate that only administrative archives should be returned to the territory affected by the change of sovereignty, while historical documents relating to that territory which are situated outside or are removed from it remain the property of the predecessor State. For example, the Treaty of Zurich of 10 November 1859 between France and Austria provided that archives containing titles to property and documents concerning administration and civil justice relating to the territory ceded by Austria to the Emperor of the French "which may be in the archives of the Austrian Empire", including those at Vienna, should be handed over to the commis-

[146] See note 125 above.

[147] See note 124 above.

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

[149] United Nations, *Treaty Series*, vol. 171, p. 293.

[150] F. Despagnet, *op. cit.*, p. 114, para. 99.

[151] P. Fauchille, *op. cit.*, p. 360, para. 219.

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

[153] The decision concerned 16 cartons of archives which a private individual had deposited with the archivist of Meurthe-et-Moselle. They related both to the ceded territories and to territories which remained French, and this provided a ground for the Court's decision.

sioners of the new Government of Lombardy.[154] If there is justification for interpreting in a very strict and narrow way the expressions used, which apparently refer only to items relating to current administration, it may be concluded that the historical part of the imperial archives at Vienna relating to the ceded territories was not affected.[155]

Article 2 of the Treaty of the same date between France and Sardinia [156] refers to the aforementioned provisions of the Treaty of Zurich, while article 15 of the Treaty concluded between Austria, France and Sardinia on the same date reproduces them word for word.[157]

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

> Any archives containing titles to property and any administrative, religious and civil justice documents relating to Savoy and the administrative district of Nice which may be in the possession of the Sardinian Government shall be handed over to the French Government.[158]

(20) Here again, the Special Rapporteur is somewhat hesitant to conclude that these texts contradict the existence of a rule permitting the successor State to claim all archives, including historical archives, relating to the territory affected by the change of sovereignty which are situated outside that territory. Would it, after all, be very rash to interpret the words *titles to property* in the formula "titles to property, administrative, religious and judicial documents", which is used in all these treaties, as alluding to historical documents (and not only administrative documents) that prove the ownership of the territory ? The fact is that in those days, in the Europe of old, the territory itself was the property of the sovereign, so that all titles tracing the history of the region concerned and providing evidence regarding its ownership, were claimed by the successor.[159] If this view is correct, the texts mentioned above, no matter how isolated, do not contradict the rule concerning the general transfer of archives, including historical archives, situated outside the territory concerned. If the titles to property meant only titles to public property, they would be covered by the words "administrative and judicial documents". Such an interpretation would seem to be supported by the fact that these treaties usually include a clause which appears to create an exception to the transfer of all historical documents, in that private documents relating to the reigning house, such as marriage contracts, wills, family mementoes, and so forth, are excluded from the transfer.[160]

(21) What really clinches the argument, however, is the fact that these few cases which occurred in French practice were deprived of all significance when France, some 90 years later, claimed and actually obtained the remainder of the Sardinian archives, both historical and administrative, relating to the cession of Savoy and the administrative district of Nice, which were preserved in the Turin repository. The agreements of 1860 relating to that cession were supplemented by the provisions of the Treaty of Peace with Italy of 10 February 1947, article 7 of which provided that the Italian Government should hand over to the French Government "*all archives, historical and administrative, prior to 1860, which concern* * the territory ceded to France under the Treaty of March 24 1860, and the Convention of August 23, 1860".[161]

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

2. *Archives established outside the territory*

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

As noted above,[162] France was able to obtain, through the Treaty of Peace with Italy of 10 February 1947, archives relating to Savoy and Nice established by the City of Turin.

Under the agreement signed at Craiova on 7 September 1940 concerning the cession of Southern Dobruja by Romania to Bulgaria, the latter obtained not only the

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[154] Article 15 of the Treaty of Peace between France and Austria, signed at Zurich on 10 November 1859 (France, *Archives diplomatiques, Recueil de diplomatie et d'histoire* (Paris, Amyot, 1861), vol. I, p. 10; M. de Clercq, *Recueil des traités de la France* (Paris, Durand et Pédone-Lauriel, 1880), vol. VII (1856-1859), p. 647).

[155] For this viewpoint, see G. May, "La saisie des archives du département de la Meurthe pendant la guerre de 1870-1871", *Revue générale de droit international public* (Paris), vol. XVIII, 1911, p. 35; and *Le traité de Francfort* (Paris, Berger-Levrault, 1909), p. 269, note 2.

[156] Article 2 of the Treaty between France and Sardinia concerning the cession of Lombardy, signed at Zurich on 10 November 1859 (France, *Archives diplomatiques (op. cit.)*, p. 16; and M. de Clercq, *op. cit.*, p. 652).

[157] Article 15 of the Treaty between Austria, France and Sardinia, signed at Zurich on 10 November 1859 (France, *Archives diplomatiques (op. cit.)*, pp. 22-23; and M. de Clercq, *op. cit.*, pp. 661-662).

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

[159] As the Special Rapporteur noted above, historical documents were often claimed by the successor State as instruments of evidence (see para. 6).

[160] Article 10 of the Convention of 23 August 1860 between France and Sardinia (see note 158 above) provided that France was to *return* to the Sardinian Government "titles and documents relating to the royal family", which implies that France had already taken possession of them together with the other historical archives. This clause relating to private papers, which is based on the dictates of courtesy, is also included, for example, in the Treaty of 28 August 1736 between France and Austria concerning the cession of Lorraine, article 16 of which left to the Duke of Lorraine family papers such as "marriage contracts, wills and other papers".

[161] United Nations, *Treaty Series*, vol. 49, p. 132.

[162] See para. 21 above.

archives situated in the ceded territory but also certified true copies of the documents at Bucharest relating to the region which had become Bulgarian.

(24) What if the archives relating to the territory affected by the change of sovereignty are situated neither within the territory itself nor in the predecessor State?

Article 1 of the Agreement of 23 December 1950 between Italy and Yugoslavia provided that "should the material referred to not be in Italy, the Italian Government *shall endeavour* * to recover and deliver it to the Yugoslav Government".[163] In other words, to use terms dear to experts in French civil law, the former is a rigorous obligation concerning the result, while the latter is a simple obligation concerning the means.

E. *Problem or the "ownership" of archives*

(25) The Special Rapporteur has been careful to specify in the suggested article that the archives "follow the transferred territory". In this way, he sought to avoid having to take a stand regarding the ownership of the archives. The article merely states that the archives cannot remain in the patrimony of the predecessor State. They "follow the territory", that is, they may become the property of the successor State or of the transferred territory, depending on circumstances and the nature of the archives (archives proper to the territory or archives relating to but situated outside the territory). The question will be settled at the discretion of the successor State, the essential point being that these items cannot remain in the patrimony of the predecessor State.

F. *Special obligations of the successor State*

(26) The proposed draft article puts the successor State under an essential obligation which is the natural counterpart of the obligation of the predecessor State to transfer all archives to the successor. Changes of sovereignty over a territory are often accompanied by population movements (establishment of new frontier lines which divide the inhabitants on the basis of a right of choice, annexations leaving the population a choice of nationality, etc.). Clearly, the population in question cannot be governed without, at least, administrative archives. For that reason the second paragraph of the draft article provides that the successor State shall not refuse to hand over to the predecessor State, upon its request, copies of any archives which it may need. Of course, this must be done at the expense of the requesting State.

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

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

(28) The successor State is sometimes obliged, by treaty, to preserve carefully certain archives which may be of interest to the predecessor State in the future.

The Agreement of 21 October 1954 between France and India concerning the French Establishments in India [164] is interesting, because it specifies the period of time for which the archives are to be preserved, and states that copies of the archives shall be handed over to the predecessor State whenever they exist.

In some cases, the successor State has handed over copies or microfilms not only of administrative archives but also of historical documents and papers.

G. *Time-limits for handing over the archives*

(29) The Special Rapporteur considered it unnecessary to suggest the fixing of a time-limit for the transfer or return of archives to the successor State, although diplomatic practice often sanctions the existence of specific provisions along those lines.[165]

Furthermore, in most countries public archives are not only inalienable but may also be claimed at any time because they are imprescriptible. The Special Rapporteur has cited various cases in this commentary.

H. *Transfer and return free of cost*

(30) The Special Rapporteur felt that there would be no point in spelling out something which goes without saying, namely that archives must be handed over to the

[163] See foot-note 143 above.

[164] For reference, see note 115 above. Article 10 concludes as follows:

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

Article 11 reads:

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

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

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

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

[165] The time-limits vary, according to the agreement in question, from 3 to 18 months. It has also been stipulated that arrangements should be made by agreement for the handing over of archives "so far as is possible, within a *period of six months*† following the entry into force of this Treaty." (Article 8 the Frontier Treaty of 8 April 1960 between the Netherlands and the Federal Republic of Germany) (see note 130 above).

successor State free of cost and free of any tax or duty. The problem has already been settled in principle in draft article 9, which states that property necessary for the exercise of sovereignty over the territory shall devolve automatically and without compensation. This property includes archives. Furthermore, this usage is firmly established in practice.

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

Article 15. Property situated outside the transferred territory

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

2. The ownership of property belonging to the predecessor State which is situated in a third State shall devolve to the successor State in the proportion indicated by the contribution of the transferred territory to the creation of such property.

COMMENTARY

A. *Introduction*

(1) Professor O'Connell writes:

> It would seem that in the case of partial succession, property of the predecessor State not actually located in the territory does not change its ownership. It has not come within the sovereign jurisdiction of the successor State, and the latter can claim only so much of it as it can seize or as is ceded to it. In the case of total succession, however, the predecessor loses its competence to own property. Such of its assets, therefore, as are situated in foreign countries must either become property of the successor State or cease to have any owner. There is no reason to adopt the latter alternative. A successor State in the case of total succession acquires all the rights of its predecessor that appertain to sovereign jurisdiction. Such jurisdiction embraces the capacity to possess assets located in foreign countries. It is reasonable to conclude, therefore, that the claims of the successor State to be the owner of the assets of its predecessor located in other States must be recognized by the States concerned.[166]

He also cites a number of writers who admit succession to property abroad in cases of total succession.[167]

(2) Professor Rousseau likewise takes the view that "it is generally agreed that property abroad of a State which is dismembered or which ceases to exist should also be transferred to the successor States . . . . There is little difference of opinion among writers on this point".[168] Like O'Connell, however, he cites Professor Hall, who, along with a very few other writers, maintains that in the case of land situated outside the territory the successor State has at the most a right to its value.[169] An obligation to sell would be imposed on it, since the right of actual possession might prove more or less impracticable for some reason arising out of the fact that the property is now in foreign territory.

(3) In the case of a partial transfer of territory, the point is not—at least in the view of the Special Rapporteur—what becomes of "public property of the *predecessor State* which is not situated in the ceded territory." Obviously—subject to a reservation which will be discussed below—such property remains under the ownership of that State and cannot be transferred to the successor. What is at issue is the exact opposite, namely, the fate of public property of the *ceded territory* situated outside the boundaries of the territory, and in particular in the territory of the predecessor State.

(4) In the case of partial succession, however, writers do not always consider—or do not consider clearly—what happens to property of the ceded territory which is situated either in the now foreign territory of the predecessor State or in the territory of a third State. Rousseau, for instance, does not consider this at all because he is only dealing with the case of total succession or, in other words, of "a State which is dismembered or which ceases to exist".[170]

(5) As has been noted previously,[171] the territory transferred may have, and is necessarily the owner of, property of its own distinct from that the ownership of which was in the hands of the predecessor State when the territory was an integral part of that State, and such property of the ceded territory may, for one reason or another,[172] be situated outside its own geographical area, either in the territory remaining to the predecessor State or in a third State. These are the two cases which will have to be considered separately in discussing the problem of property of the territory itself situated abroad.

(6) There remains the property concerning which a reservation was expressed.[173] This is property situated abroad which belonged to the predecessor State before the change of sovereignty. The problem is whether the successor State would be entitled to claim a share of such property with the argument that the territory now added to it may have contributed to the creation of the property in question when that territory was an integral part of the predecessor State. This is another case that has to be considered separately. It is covered by paragraph 2 of the proposed article.

Let us consider each of these cases:

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[166] D. P. O'Connell, *State Succession... (op. cit.)*, vol. I, p. 207.

[167] *Ibid.*, foot-note 2.

[168] Ch. Rousseau, *op. cit.*, p. 143.

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

[170] In a paragraph headed "Exposition of the problem", Ch. Rousseau excludes even more clearly from the matters he is considering the problem of property of the ceded territory situated in the predecessor State: "It is equally important to know where *the property* affected by the transfer *is situated*—whether it is in the territory transferred or in the territory of *any third State*" (Ch. Rousseau, *op. cit.*, pp. 122-123).

[171] See *Yearbook...1970*, vol. II, pp. 150-151, document A/CN.4/226, paras. 28 and 29 of the commentary to article 2.

[172] *Ibid.*, para. 32 of the commentary.

[173] See para. 3 above.

B. *Property proper to the transferred territory which is situated outside that territory*

(7) The Special Rapporteur previously noted the lack of attention generally given by writers to public property proper to the transferred territory.[174] The reason why they appear to have neglected this problem, despite its importance, is, perhaps, that they tacitly believed such property should not be affected by the fact of transfer of the territory. While continuing to belong to the latter, the public property in question follows its political and juridical destiny.

(8) A resolution of the Institute of International Law laid down the same principle, stating that local corporate bodies retained the right of ownership over their property after territorial changes: "The territorial changes leave intact those patrimonial rights which were duly acquired before the change took place." The resolution specified "*These rules also apply to the patrimonial rights of municipalities or other corporate bodies belonging to the State which is affected by the territorial change* *."[175]

This plain fact is worth recalling and recording in a rule of the kind suggested by the Special Rapporteur; for, although it is so obvious as to be unremarkable in the case of property situated in the territory itself, it becomes most important when a decision has to be taken on the fate of property of the territory itself which is situated outside its geographical boundaries.

(9) Clarity demands that a distinction should be made between cases where such property is situated in the predecessor State and cases where it is in a third State.

1. *Property proper to the territory which is situated in the predecessor State*

(10) This is a clear case: it concerns property belonging as of right to the territory appended to a pre-existing State but situated in the rest of the territory retained by the predecessor State. In this case, one can discern two principles, namely, the principle of non-transferability of ownership of property of this kind and the principle of modification of the legal régime governing it.

Non-transferability of ownership of property of this kind

(11) The occurrence of State succession does not transfer the right of ownership of property of this kind. The property remains within the patrimony of the ceded territory. It cannot suddenly, merely because of the succession, become the property of the predecessor State, even if it is situated in the territory remaining to that State after curtailment. Since the predecessor State did not own this property before succession, it cannot, as a result of the succession, create new rights for itself. Nor does property of this kind pass to the successor State merely because of the succession. There appears to be no valid reason for stripping the ceded territory of its own property.

Modification of the legal régime governing property of this kind

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

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

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

It is this idea which, in a tentative and probably not entirely suitable formulation, the Special Rapporteur has tried to express in the suggested rule stating that "public property proper to the transferred territory which is situated outside that territory *shall pass within the juridical order of the successor State* *".

2. *Property proper to the transferred territory which is situated in a third State*

(13) Property of this kind unquestionably passes under the protection of the juridical order of the successor State.

C. *Property of the predecessor State which is situated outside the territory retained by that State*

(14) Property of the predecessor State falls into four categories, according to where it is situated:

(*a*) Being owned by the predecessor State, it may be in the part of the territory retained by that State, in which case it of course remains, in all circumstances, under its sole ownership;

(*b*) It may be situated in the part of the territory ceded to the successor State. In this case, the principle of the transfer of State property situated in the territory affected by the change of sovereignty, which has already been

[174] See *Yearbook...1970*, vol. II, pp. 150-151, document A/CN.4/226, paras. 28 *et seq.* of the commentary to article 2, and pp. 156 *et seq.*, paras. 21 *et seq.* of the commentary to article 7.

[175] Paragraphs 3 and 4 of resolution II of the Institute of International Law adopted at its forty-fifth session, held at Siena from 17 to 26 April 1952 (*Annuaire de l'Institut de droit international, 1952, II* (Basle), vol. 44, pp. 475-476).

discussed, is fully applicable and the property concerned is acquired by the successor State;

(*c*) There remain the two cases in which the property of the predecessor State is either in the territory of the successor State or in that of a third State. It would certainly appear at first sight that only the *status quo* would be fair and acceptable. However, there may have been instances where claims have been advanced by the successor State.

(15) It is with these cases in mind that the Special Rapporteur has suggested, not without considerable misgivings, a paragraph 2 under which public property of the predecessor State, in so far as it is situated outside the transferred territory and outside the territory of the predecessor State, will be divided between the successor and the predecessor on the basis of the past contribution of the transferred territory to the creation of such property. The Commission will say whether it is both correct and useful to establish a provision of the kind suggested.

SECTION 2. NEWLY INDEPENDENT STATES

Article 16. Currency and the privilege of issue

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

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

3. In consideration of the foregoing, the successor State shall assume responsibility for the exchange of the former monetary instruments, with all the legal consequences which this substitution of currency entails.

COMMENTARY

(1) The comments that were made earlier [176] on the subject of the privilege of issue, as an attribute of sovereignty, naturally apply also in the case of accession to independence. There have been cases where agreements between the former metropolitan country and the ex-colony allowed the predecessor State to continue temporarily to exercise the privilege of issue in the territory which had become independent.

It is nevertheless a firm principle that the privilege of issue belongs to the successor State, the existence of such agreements being a manifestation of the power of free disposal which the newly independent State has in this field pending transfer.

(2) The agreements concluded by the French-speaking African States and France are instructive in this connexion. The newly independent State is recognized as sole possessor of the privilege of issue, which it nevertheless entrusts to a French or Community body. Article 1 of the quadripartite Agreement on monetary co-operation between France and the States of Equatorial Africa reads as follows:

> The French Republic *recognizes that the accession to international sovereignty* * of the States of Equatorial Africa *confers on them the right to introduce a national currency and to establish their own bank of issue* *.

Once the *possession* of the right has thus been recognized, the *exercise* of it is temporarily left to a Community body supervised by the French Republic. Article 2 of the Agreement is accordingly worded as follows:

> The States of Equatorial Africa confirm their adherence to the Monetary Union of which they are members within the franc area. The franc CFA issued by the Banque centrale des Etats d'Afrique équatoriale . . . shall remain the lawful currency being legal tender throughout their territories.[177]

(3) Under this Franco-African system, monetary policy was in principle decided multilaterally within a franc area comprising, in addition to the Banque de France, four banks of issue closely linked to the French Treasury. The West African Monetary Union (UMOA), composed of the Ivory Coast, Senegal, Upper Volta, Niger, Dahomey and Togo,[178] has a common currency, the franc CFA (Communauté financière africaine), issued by the Banque Centrale des Etats de l'Afrique de l'Ouest (BCEAO), whose head office is in Paris. The Banque Centrale des Etats de l'Afrique équatoriale et du Cameroun, which following the recent agreements concluded at Brazzaville in December 1972 and at Fort-Lamy in February 1973 has become the Banque d'Etat de l'Afrique centrale (BEAC), comprises Cameroon, the People's Republic of the Congo, Gabon, Chad and the Central African Republic and also has its head office in Paris. Mali and the Malagasy Republic each have their own banks of issue.

(4) The peculiarity of these four banks (which issue a franc CFA that has no "international personality" and has an absolutely fixed rate of exchange with the French franc),

[176] See above, paras. 5 *et seq.* of the commentary to article 12.

[177] Agreement on Co-operation in Economic and Financial Matters between the French Republic and the Central African Republic, the Republic of the Congo and the Republic of Chad (France, *Journal officiel de la République française, Lois et décrets* (Paris), 24 November 1960, 92nd year, No. 273, p. 10461, and Decree of publication No. 60-1230, *ibid.*, p. 10459).

The agreement on Co-operation in Monetary, Economic and Financial Matters between the French Republic and the Malagasy Republic (*ibid.*, 20 July 1960, No. 167, p. 6612) includes an article 1 recognising Madagascar's right to introduce its own national currency and to establish its own national bank of issue, and an article 2 entrusting the function of issuing currency to a Malagasy public establishment and creating a currency linked to the French franc.

See also other agreements entered into by France on monetary, economic and financial matters, including in particular the Treaty of 24 April 1961 with the Ivory Coast (*ibid.*, 6 February 1962, 94th year, No. 30, p. 1261), especially article 19; the Agreements of 22 June 1960 with the Federation of Mali (*ibid.*, 20 July 1960 *(op. cit.)*, p. 6629); the "Bamako" Agreement of 9 March 1962 with Mali, after the dissolution of the Federation of Mali (*Ibid.*, 10 July 1964, 96th year, No. 160, p. 6131); the Agreements of 24 April 1961 with Niger (*ibid.*, 6 February 1962 *(op. cit.)*, p. 1292; the Agreement of 13 November 1960 with Cameroon (*ibid.*, 9 August 1961, 93rd year, No. 186, p. 7429); the Agreements of 17 August 1960 with Gabon (*ibid.*, 24 November 1960 *(op. cit.)*, p. 10481); the Agreement of 10 July 1963 with Togo (*ibid.*, 10 June 1964, 96th year, No. 134, p. 5000); the Treaty of 19 June 1961 with Mauritania (*ibid.*, 6 February 1962 *(op. cit.)*, p. 1324).

[178] Mauritania, which was the seventh member, withdrew as from the end of December 1972 and established its own bank of issue.

is that each of them has an "operations account" opened in its name with the French Treasury in Paris. This account is credited with all earnings by the French-speaking African State or group of States from their trade with other countries and debited with the amounts of their expenditure abroad.

In return, the French Treasury gives these four banks of issue its guarantee—in principle unlimited—by undertaking to supply them with francs and foreign exchange to balance their operations accounts.[179]

(5) The fact that these monetary agreements are at present being revised testifies both to their eminently evolutive character and to the newly independent State's right of free disposal with respect to its privilege of issue, the exercise of which it can at any time reclaim and the possession of which, indeed, it never legally lost.

(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,[180] or to giving some other name to the Spanish peso without changing its value or the structure of the currency.[181]

(7) 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.

(8) 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.

(9) 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.

(10) Paragraph 2 of the proposed article covers the problems of monetary tokens "proper" to the territory transferred.

This paragraph, like paragraph 1 of the article under discussion, may be regarded as simply a descriptive provision having nothing, strictly speaking, to do with State succession. Many dependent territories had their own institution of issue and their own currency. The privilege of issue in the territory was exercised by a private bank, a government body of the metropolitain country or a public body of the territory. 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. Paragraph 2 of the proposed article simply makes it clear 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 prefers, should pass under the control of the successor State.

(11) 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 Pakistan [182] and by the Pakistan (Monetary System and Reserve Bank) Order, 1947. 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.

(12) India succeeded to the sterling assets of the Reserve Bank of India, estimated at £ 1,160 millions.[183] 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

[179] It is no secret, however, that many African States requested revision of these monetary agreements because they considered the guarantee offered by the French Treasury to be illusory. In their view, the French Treasury operates less like a generous guardian than like a prudent banker who gives an unlimited guarantee only to a customer having a credit balance. In other words, the guarantee would not operate. It is a fact that the agreements which were concluded lay down very strict rules to guard against imbalances between receipts and expenditure in the operations accounts that were opened with the French Treasury. It is a further fact that those accounts are in surplus, thus draining off to France the African resources amassed by the local banks.

[180] 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.

[181] "*Boliviano*", "*bolivar*" and "*sucre*" were the new names given to the Spanish peso in Bolivia, Venezuela and Ecuador, respectively.

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

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

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.[184]

Article 17. Public funds and Treasury

1. Public funds, liquid or invested, which are proper to the territory that has become independent shall remain the property of that territory, irrespective of where they are situated.

2. Public funds of the predecessor State, liquid or invested, which are situated in the territory that has become independent shall pass into the patrimony of that territory.

3. The rights of the Treasury of the territory that has become independent shall not be affected by the change of sovereignty, vis-à-vis the predecessor State or otherwise.

4. The obligations of the Treasury of the territory that has become independent shall be assumed by that territory on such terms and in accordance with such rules as apply to succession to the public debt.

COMMENTARY

A. *Public funds*

1. *Funds proper to the territory*

(1) Paragraph 1 does not appear to raise any complicated question, at least so far as the statement of the principle is concerned, although the actual application of the principle may indeed pose problems, especially when it comes to a practical definition of "public funds which are proper to the territory".

(2) As a corporation under internal public law, the territory will usually have had, prior to independence, a system of public finances consisting of machinery, institutions and a Treasury distinct from those of the colonial Power. Public funds which accordingly belonged to the territory prior to independence, being the product of duties, taxes and fees of all kinds, debt-claims and the like, connected with activities in the territory, can only remain among the financial assets of the territory once it has become independent. Logically, their status cannot be affected in any way by the fact of their being in the territory itself or in the territory of the predecessor State or of any other third State, since it is well established that they belonged to the territory that has become independent.

2. *State funds*

(3) State funds which belong to the colonial Power but are in the territory should, whether liquid or invested, pass into the patrimony of the successor State pursuant to the general principle of the transfer of public property of the State.

(4) 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 separable and detachable from that of the mandated country.

B. *Treasury*

(5) Treasury relations are very complicated. Reduced to simple terms, they comprise two aspects. In the first place, there is no reason why the rights of the Treasury of the territory that has become independent should, paradoxically, cease to exist simply because of the territory's accession to independence. In the second place, the obligations, whether or not corresponding, previously incurred by the Treasury of the territory to private persons or to the predecessor State or any other State are assumed, in the absence of special treaty provisions, on such terms and in accordance with such rules as apply to succession to the public debt. It does not seem possible to say more than this on the subject without running the risk of foundering on the technical complexity of these problems.

(6) 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.[185]

(7) 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 20 years to repay the remainder, free of interest, starting on 1 April 1952. The former colonial Power also waived repayment of the costs it had incurred for the civil administration of Burma after 1945 during the period of reconstruction.[186]

Article 18. Archives and public libraries

1. Archives and public documents of every kind relating directly or belonging to the territory that has become independent, and public libraries of that territory, shall, irrespective of where they are situated, be transferred to the newly independent State.

[184] For details, see I. Paenson, *op. cit.*, *passim* and in particular pp. 65-66 and 84.

[185] 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).

[186] 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.

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

COMMENTARY

(1) The Special Rapporteur will not revert to the question of the importance of archives [187] or to the definition of the items affected by the transfer. These are archives and public documents *of every kind*,[188] i.e. items irrespective of (*a*) their *ownership* (by the State, by an intermediate authority, by a public body, etc.), (*b*) their *type* (diplomatic, political, administrative, military, economic, judicial, historical, geographical, legislative, regulative, ecclesiastical, etc.), (*c*) their *character* (public or secret archives), (*d*) their *nature* (manuscript or printed, graphic material or photographs), (*e*) their *substance* (paper, parchment, fabric, leather, etc.), (*f*) their *variety* (plans, registers, scrolls, title-deeds, documents, etc.). It is also known that the term "archives of every kind" covers items which are instruments of evidence as well as those which are instruments of administration.[189]

(2) Article 33 of the Agreement of 21 October 1954 between France and India,[190] concerning the French Establishments in India, states that

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

Although this case of decolonization does not come within the scope of the present study on "newly independent States", the Special Rapporteur has thought fit to refer to it in order to draw attention to the fact that the rare example of this kind limiting the transfer of archives to a particular category of archives express the freedom of States on the Treaty plane but in no way reflect a rule or custom,[191] inasmuch as nothing can dispense the predecessor State from the obligation of handing over all archives which have a link with the territory.

A. *The archives-territory link*

(3) Obviously, the successor State cannot claim simply any archives but only those "belonging to the territory".[192] The Special Rapporteur refers readers to a previous commentary [193] for an elucidation of this expression. This fact of the archives belonging to the territory must be appraised from two standpoints. First, there are archives acquired by or on behalf of the territory and, secondly, there are items concerning the territory because of the organic link wich attaches them to it.

B. *Archives situated outside the territory that has become independent*

1. *Archives which have been removed*

(4) There seems to be ample justification for accepting as a rule the fact that the successor State should receive all the archives, historical or other, relating to the territory affected by the change of sovereignty. even if those archives have been removed by the predecessor State. The application of such a principle would considerably help new States to acquire greater mastery of their internal and external problems. A better knowledge of these problems can be gained only through the possession of retired or current archives, which should be left with or returned to the States concerned. For obvious reasons, however, the former colonial Power cannot be expected to agree to hand over all archives, especially those linked to its *imperium* over the territory concerned. Many considerations relating to politics and expediency prevent such Powers from leaving to the new sovereign revealing documents on colonial administration. For that reason, the principle of the transfer of such archives—which the former metropolitan country is careful to remove before independence—is rarely applied in practice.

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

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

(6) However, in the case of the archives mentioned under (*a*) above, which may have been removed by the former metropolitan country, the principle of transfer should be firmly and immediately applied. These archives

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[187] See *Yearbook...1970*, vol. II, p. 152, document A/CN.4/226, part two, paras. 1-6 of the commentary to article 7.

[188] See above, para. 2 *et seq.*, of the commentary to article 14.

[189] *Ibid.*, para. 6 *et seq.*, of the commentary.

[190] For reference, see note 115.

[191] See *Yearbook...1970*, vol. II, document A/CN.4/226, part two, paras. 13-15 of the commentary to article 7.

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

[193] See above, paras. 9-12 of the commentary to article 14.

antedate colonization, they are the product of the land and spring from its soil; they are bound up with the land where they came into existence and they contain its history and its cultural heritage.

(7) Similarly, the removal of administrative documents of all kinds mentioned under (*c*) above, which may have occurred in some cases, is bound to be a source of considerable inconvenience, confusion and maladministration for the young independent State, which already faces considerable difficulties owing to its inexperience and lack of trained personnel. Except in the rare cases where independence resulted from a sharp and sudden rupture of the links between the metropolitan country and the territory, which, compounded by misunderstandings or rancour, led to the malicious destruction or removal of administrative documents, the removal of these archives, which are instruments of administration, has reflected primarily the metropolitan country's desire to retain documents and titles which might concern the minority composed of its own nationals. However, reproduction techniques are now so highly developed that it would be unreasonable and unjustified to retain such administrative or technical archives, as this would entail depriving a majority in order to meet the needs of a minority, which could, moreover, be satisfied in another way.

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

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

> The problem is posed at present in the relations between France and Cambodia, but so far no final settlement seems to have been reached. The logical solution would be the return of all items concerning the history of Cambodia during the period in which France assumed international responsibility for its affairs (1863-1953).[194]

In the case of Algeria, historical archives concerning the pre-colonial period, which had been carefully catalogued by the colonial administration, were removed by the latter immediately before independence.[195] The negotiations between the two Governments have so far resulted in the return of some of the documents from the Turkish collection and microfilms of part of the Spanish collection.[196]

[194] Ch. Rousseau, *op. cit.*, p. 136.

[195] These archives are commonly known as the Arab collection, the Turkish collection and the Spanish collection.

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

2. *Archives established outside the territory*

(10) The Special Rapporteur has not found any specific information concerning this field and this type of succession. However, the problem of the ownership of the India Office library furnishes an example of an "unresolved" case. It will be recalled that in 1801 the British East India Company established a library which now contains about 280,000 volumes and some 20,000 unpublished manuscripts, constituting the finest treasury of Hinduism in the world. In 1858 this library was transferred to the India Office in Whitehall. After the partition in 1948, the Commonwealth Relations Office assumed responsibility for the library. On 16 May 1955 the two successor States, India and Pakistan, asked the United Kingdom Government to allow them to divide the library on the basis of the percentages (82.5 per cent for India, 17.5 per cent for Pakistan) used in 1947 for deciding all assets between the two Dominions.

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

C. *Special obligations of the newly independent State*

(11) The draft article puts the successor State under an essential obligation which is the natural counterpart of the obligation of the predecessor State to transfer all archives to the successor. Decolonization has sometimes been accompanied by repatriation to the former metropolitan country of populations which cannot be governed without archives. For that reason paragraph 2 of the article provides that the successor State shall not refuse to hand over to the predecessor State, upon its request, copies of any archives which it may need.

In some cases, the newly independent State has handed over copies or microfilms not only of administrative archives but also of historical documents and papers.[197]

Article 19. Property situated outside the territory of the newly independent State

1. Public property proper to the territory that has become independent which is situated outside that territory shall remain its property upon its accession to independence.

2. Public property belonging to the predecessor State which is situated in a third State shall be apportioned between the predecessor State and the newly independent State proportionately to the latter's contribution to the creation of such property.

[197] After France had restored to Algeria certain items from the "Turkish collection", which forms part of the historical archives removed immediately before independence (see para. 9 and note 195 above), Algeria offered France microfilms of some documents from that collection following their return. It had previously allowed all the registers of births, marriages and deaths held by Algerian record offices to be microfilmed.

COMMENTARY

A. *Property proper to the territory that has become independent*

(1) The territory acceding to independence may leave, particularly in the former metropolitan country, property bought with its own funds. It may also own property in other countries. State succession cannot have the paradoxical effect of conferring on the predecessor State a right of ownership which it did not possess over such property prior to the territory's independence. The fact that the property in question is situated outside the newly independent territory cannot, on its own, constitute grounds for making an exception to that obvious principle. Ownership of such property cannot depend on geographical location.

(2) However, unlike the case of the partial transfer of a territory from one State to another pre-existing State, which was examined above, in the case of decolonization the transferred territory and the territory of the successor State are geographically coextensive, so that the property of one is also the property of the other. In this type of succession, the successor State itself enjoys the ownership of this property and does not simply receive the property into the new juridical order it has created.

(3) The usual distinction should be drawn between property of the territory which is situated in the former metropolitan country and property which is situated in the territory of a third State.

1. *Property which is situated in the former metropolitan country*

(4) The occurrence of State succession does not transfer the right of ownership of public property of this kind and the successor State—in other words, the formerly dependent territory—retains ownership of such property.

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

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

On the eve of independence, during the Belgian-Congolese Conference at Brussels in May 1960, the Congolese negotiators had requested that the liquid assets, securities and property rights of the Special Committee for Katanga and of the Union minière should be divided in proportion to the assets of the Congo and its provinces, on the one hand, and of private interests, on the other hand, so that the new State could succeed to the sizable portfolio of stocks and shares situated outside its territory. Numerous complications ensued, in the course of which the Belgian Government, without the knowledge of the prospective Congolese Government, pronounced the premature dissolution of the Special Committee for Katanga so that its assets could be shared out and the capital of the Union minière could be reapportioned. This was all designed to ensure that the Congo no longer had a majority holding in these entities.[199] This first dissolution of the Special Committee, which was the principal shareholder in the Union and in which the State held a two thirds majority while the rest belonged to the Compagnie du Katanga, was decided on 24 June 1960 under an agreement signed by the representatives of the Belgian Congo and of the Compagnie du Katanga.[200] The agreement was approved by Decree of the King of the Belgians on 27 June 1960.[201]

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

(6) Eventually, the Belgian-Congolese agreements of 6 February 1965 [202] put an end to these unilateral measures by both parties. These agreements are partly concerned with the assets situated in Belgium—in other words, public property situated outside the territory involved in the change of sovereignty. In exchange for the cession to the Congo of the net assets administered by the Special Committee in that territory, the Congolese party recognized the devolution to the Compagnie du Katanga of the net assets situated in Belgium. Various compensations and mutual retrocessions took place in order to unravel the tangled skein of respective rights. On 8 February 1965, in an official ceremony at Brussels, Mr. Tshombé accepted the first part of the portfolio of the Congo on behalf of his Government.

This was not, however, the end of the affair. After General Mobutu had taken office, and after various upheavals, the Union minière du Haut-Katanga was nationalized on 23 December 1966 because it had refused to transfer its headquarters from Brussels to Kinshasa, believing that the transfer would have the effect of placing under Congolese jurisdiction all the assets of the company

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

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

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

[201] *Ibid.*

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

situated outside the Congo. A compromise was finally reached on 15 February 1967.

(7) On the occasion of the disannexation of Ethiopia,[203] articles 37 and 75 of the Treaty of Peace of 10 February 1947 [204] required Italy to restore objects of historical value to Ethiopia, and the Agreement of 5 March 1956 [205] between the two countries contained various annexes listing the objects concerned. Annex C allowed the return to Ethiopia of the large Aksum obelisk, which Italy was obliged to dismount and remove from a square in Rome and transport to Naples at its expense for shipment to Ethiopia.

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

This was so, for example, in the case of the resolutions of the United Nations General Assembly on economic and financial provisions relating to Libya and Eritrea.[206]

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

(9) There now remains to be discussed the case of property of the newly independent territory itself which is in a third State.

2. *Property which is situated in a third State*

(10) The case in itself does not give rise to any specific problems. The territory that has become independent retains full ownership over public property it possesses in a third country (for example, buildings or premises situated in a neighbouring country or territory or, more frequently, the continuation of a railway line). Sometimes the problems are stated partly in terms of succession of governments. The case of Algerian funds deposited in Switzerland during the liberation war is a good example of this.

(11) From 1954 to 1962, the Algerian National Liberation Front (NLF) had collected funds to cover the cost of the armed struggle in Algeria. On 19 September 1958, a Provisional Government of the Algerian Republic (GPRA) was established at Cairo; it was recognized *de facto* or *de jure* by some 30 countries.[207] The National Liberation Front, which was the only liberation party during the war and also the only governing party after independence, stated in its statutes, adopted in 1959, that its resources did not belong to it as a movement but were "national property" in law and in fact (article 39, paragraph 2). At the end of the war, the unexpended balance of the funds intended for use in the struggle amounted to some 80 million Swiss francs; these funds were in various bank accounts in the Middle East in the name of the GPRA and in Europe in the name of the NLF. In 1962, all these funds were deposited together in a Swiss bank, in the name of Mr. Mohammed Khider, General Secretary of the NLF, acting in his official capacity.

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

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

If this case is considered, from the civil viewpoint, as a problem of succession of governments, it has obvious similarities with the case of the Irish funds considered later.[208] The Algerian liberation movement and its Provisional Government of the day left property to which independent Algeria should normally succeed through its single ruling party and its new Government. From the outset, this property had the status of "national property", according to the statues of the NLF.

(13) On 16 July 1964, the Algerian authorities, represented by the leader of the NLF and the Head of the Government, brought a suit before the Swiss courts, which, however, were induced by the defence to evaluate the legitimacy of the NLF, although they were *judicial* bodies and, moreover, foreign ones. This was because the defendant had stated that he would hand over the funds only to the "legitimate" NLF. Which NLF ? According to the defendant, the one that would emerge from a new national Congress of the party. A Congress had in fact been held, but the defendant had not considered it "legitimate". There is no doubt that, from the strictly juridical point of view, this notion of legitimacy should have been ruled out of the proceedings. The funds had, from the outset, been "Algerian national property", and upon the attainment of independence should certainly have been returned to the Algerian public authorities, the party and the Government.

It is all the more necessary to bring this case—which has its own special characteristics, although in some respects it resembles the case of the Irish funds—to a

[203] The Special Rapporteur realizes that the case should not really be considered under "Newly independent States". (See above, the second paragraph of note 96.)

[204] For reference, see note 148 above.

[205] United Nations, *Treaty Series*, vol. 267, p. 189.

[206] United Nations General Assembly resolutions 338 (V) of 15 December 1950 and 530 (VI) of 29 January 1952.

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

[208] See below, paras. 1 and 2 of the commentary to article 31.

logical conclusion because Mr. Khider died at Madrid on 4 January 1967, and if the funds are not assigned to the Algerian authorities, to whom they belong, they may become "ownerless property".

B. *Property belonging to the predecessor State which is situated in a third State*

(14) In the draft article under consideration, the Special Rapporteur had suggested a paragraph 2 whereby property which is situated in a third country and to the creation of which the formely dependent territory contributed would be apportioned between the predecessor State and the successor State.

(15) One writer notes that "countries coming into existence through decolonization do not seem to have claimed any part of the subscriptions of the States which were responsible for their international relations" [209] including, in particular, their representation in international or regional financial institutions. But the fact that these newly independent countries—and particularly those which were deemed in law to form an integral part of the colonial Power—did not think of claiming some of these assets, or were unable to do so, cannot logically be used to cast any doubt on the validity of the principle that has been enunciated in paragraph 2 of the draft article under consideration.

(16) This seems to be confirmed by the fact that participation in various intergovernmental bodies of a technical nature is open to dependent territories and that problems of the type described above may arise in this area. No doubt such questions will be examined by the Commission when it undertakes the study of succession of States and international organizations.

SECTION 3. UNITING OF STATES AND DISSOLUTION OF UNIONS

Article 20. Currency and the privilege of issue

1. The privilege of issue shall belong to the successor State throughout the territory of the union or of each State in the event of dissolution of the union.

2. In the event of dissolution of the union, the assets of the joint institution of issue shall be shared *pro parte* between the successor States, which in consideration of the foregoing shall assume responsibility for the obligations relating to the substitution of new currencies for the former currency.

COMMENTARY

The possession and exercise of the privilege of issue are generally regulated in the instruments establishing the union of States. The privilege of issue is granted to the successor State, that is to say the union. In the event of dissolution of the union, each State possesses its privilege of issue, but the practical aspects of resolving the problems are extremely complex. The peace treaties of Saint-Germain-en-Laye and Trianon which sanctioned the dismemberment of the Austro-Hungarian monarchy 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 overstamped the old paper money during an initial period as outward evidence of their power to issue currency.[210]

Article 21. Public funds and Treasury

1. The union shall receive as its patrimony the public funds and Treasuries of each of its constituent States except where the degree of their integration in the union or treaty provisions allows each State to retain all or part of such property.

2. In the event of dissolution of the union, the public funds and Treasury of the union shall be apportioned equitably between its constituent States.

COMMENTARY

(1) Generally both international treaty instruments and instruments of internal law (such as a referendum) define and effect the uniting of States, stating the degree of integration. It is on the basis of these various expressions of will that the financial system of the union, and in particular the treatment of the public funds and Treasuries of each predecessor State, is established.

Since no precise information on this point is provided in unification agreements that have been concluded, the Special Rapporteur felt he should suggest in paragraph 1 of the article under consideration a simple and logical rule for complete succession of the union to its constituent States.

(2) Paragraph 2 of the article, dealing with cases of dissolution of the union, simply states a rule of equitable apportionment of the joint public funds and Treasury between the successor States.

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[209] L. Focsaneanu, "Les banques internationales intergouvernementales", *Annuaire français de droit international, 1963* (Paris), vol. IX, p. 133.

[210] 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 in *British and Foreign State Papers, 1920*, vol. 113 *(op. cit.)*, pp. 561-564 and *ibid., 1919*, vol. 112 *(op. cit.)*, pp. 410-412. Article 206 of the Treaty of Saint-Germain and article 189 of the Treaty of Trianon resolved the problem as follows: (*a*) "Each one of the States to which territory of the former Austro-Hungarian monarchy is transferred and each one of the States arising from the dismemberment of that monarchy, including Austria and Hungary" were given two months to overstamp the currency notes issued in their respective territories by the former Austro-Hungarian institution. (*b*) The same States were given 12 months to replace the overstamped notes with their own currency or with a new currency under conditions to be determined by them. (*c*) These same States were either to overstamp the currency notes which they had already withdrawn from circulation or to hold them at the disposal of the Reparation Commission. These very long articles contain other provisions and set up a very complex system for liquidating the Austro-Hungarian Bank. (See Monès del Pujol, "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), vol. XLVI, April-June 1923, pp. 161-195.)

International practice has sanctioned this formula of liquidation in accordance with the principles of equity. The Special Rapporteur has accordingly not deemed it necessary to complicate the text of the article with a painstaking description of the criteria of equity in a question which is extremely technical and which he is far from being competent to judge. 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 spelled out in individual agreements.

(3) The dissolution of the short-lived Federation of Mali was regulated, so far as public funds and 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 proportion 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.[211]

Article 22. Archives and public libraries

1. Except where otherwise specified in treaty provisions aimed at the establishment of a collection of common central archives, archives and public documents of every kind belonging to a State which unites with one or more other States and its public libraries, shall remain its property.

2. In the event of dissolution, the central archives of the union and its libraries shall be placed in the charge of the successor State to which they relate most closely or apportioned between the successor States in accordance with any other criteria of equity.

COMMENTARY

(1) The Special Rapporteur will not revert to the importance or to the definition of archives and public documents.[212] It will merely be recalled that "archives" should be understood in the broadest sense of the term, as it is used in diplomatic instruments relating to such cases of dissolution of unions, and accordingly covering "archives, registers, plans, title-deeds and documents of every kind".[213]

(2) Article 22 is at the same time similar to and different from the preceding article. As in article 21, treaty stipulations are allowed to regulate the fate of the archives of States in a union. On the other hand, where there are no treaty provisions the suggested article 22 allows the predecessor State to dispose of its archives, whereas article 21 allowed the union, namely the successor State, freely to dispose of public funds and treasuries.

(3) This distinction obviously had to be made. If the archives of the predecessor State are historical in character, they are of interest to it alone and of relatively little concern to the union (unless it is decided by treaty for reasons of prestige or other reasons to transfer them to the seat of the union or to declare them to be its property). Any change of status or application, particularly a transfer to the union of other categories of archives needed for the direct administration of each State, would be not only unnecessary for the union but highly prejudicial for the administration of the States forming it.

It is a different matter for public funds and treasuries, the transfer of which to the union must be presumed, unless there are treaty provisions to the contrary, since there is no question that they must be the subject and the necessary instruments of a unified policy within the union.

(4) Paragraph 2 of the article refers to the case of dissolution. Each of the successor States receives the archives and public documents of every kind belonging or rather relating to its territory, on condition that it hands over copies of them to the other successor States, upon the request and at the expense of the latter. The central archives of the union are apportioned between the successors if they are divisible or placed in the charge of the successor State they concern most directly if they are indivisible, on condition that in both cases the beneficiary will make or authorize copies for the other States upon their request and at their expense.

(5) In general, it is the link between the archives and the territory which is the determining factor.

For example, following the dissolution in 1944 of the Union between Denmark and Iceland, the High Court of Justice of Denmark ruled, in a decision of 17 November 1966,[214] that some 1,600 priceless parchments and manuscripts containing old Icelandic legends should be restored to Iceland. It should be noted that these parchments were not public archives, since they did not really concern the history of the Icelandic public authorities and administration, and were not the property of Iceland since they had been put into a collection constituted in Denmark by an Icelander who was Professor of History at the University of Copenhagen. He had saved them from destruction in Iceland, where they were said to have been used on occasion to block up holes in the doors and windows in the houses of Icelandic fishermen. These parchments, whose value has been estimated by experts at 600 million Swiss francs, had been bequeathed in perpetuity by their owner to a university foundation in Denmark.

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[211] See J.-Cl. Gautron, "Sur quelques aspects de la succession d'Etats au Sénégal", *Annuaire francais de droit international, 1962* (Paris), vol. VIII, 1963, p. 861.

[212] See above, commentary to article 14.

[213] Treaty of Saint-Germain-en-Laye, article 93, on Austria (*British and Foreign State Papers, 1919*, vol. 112 *(op. cit.)*, p. 361) and Treaty of Trianon, article 77 on Hungary (*ibid., 1920*, vol. 113 *(op. cit.)*, p. 518).

[214] *Revue générale de droit international public* (Paris), 3rd series, vol. XXXVIII, No. 2 (April-June 1967), p. 401.

(6) The Special Rapporteur is obliged to his colleague in the International Law Commission, Professor Tammes, for providing information concerning 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 fourteenth 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 greatest cultural and historical value to them. On 21 April 1971 the Danish authorities returned the Flatey Book and other documents; over the next 25 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 first documents left the Royal Library at Copenhagen, the Library flew the flag at half-mast.[215]

Article 23. Property situated outside the territory of the union

1. Property situated outside the territory of the union and belonging to the constituent States shall, unless otherwise stipulated by treaty, become the property of the union.

2. Property of the union situated outside its territory shall, in the event of dissolution, be apportioned equitably between the successor States.

COMMENTARY

(1) The Special Rapporteur admits that he had considerable doubts about suggesting in paragraph 1 of article 23 a rule assigning all property of the constituent States to the union, when such property is situated abroad. Perhaps the general structure of the draft articles as a whole would suggest that a rule to the contrary should be inserted here, allowing the constituent States to retain ownership of their property situated abroad. The Special Rapporteur leaves the question open for discussion.

(2) The rule set out in paragraph 2 of this article seems sounder. In the event of a dissolution, the property owned by the union abroad can only be shared "equitably" among the successor States. There again, the Special Rapporteur has not tried to seek rigid criteria governing equitable apportionment, since questions of that kind are bound to be conditioned by circumstances.

(3) A marginal case will be mentioned here purely as a reminder. It is difficult to place in the typology of succession and, moreover, it concerns an unsuccessful attempt to dissolve a union. This is *the McRae case*, which arose in connexion with the American War of Secession.

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

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

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

> the clear public universal law that any government which *de facto* succeeds to any other government, whether by revolution or restoration, conquest or reconquest, *succeeds to all the public property . . . and to all rights in respect of the public property of the displaced power* †.[216]

(5) According to some writers, this is a case of succession of States and not of succession of governments, since the Southern Confederate Government, which represented a number of states, had been recognized, at least as a belligerent, by various foreign States because it had exercised an effective administration for a lengthy period of time over a clearly defined territory.

SECTION 4. DISAPPEARANCE OF A STATE THROUGH PARTITION OR ABSORPTION

Article 24. Currency and the privilege of issue

1. The privilege of issue shall belong to the successor State in the territory absorbed or the portion of territory allocated to it in the partition.

2. The successor State or States shall take over the assets of the institution of issue and shall assume its liabilities in proportion to the volume of currency in circulation or held in the territory in question.

COMMENTARY

(1) The observations formulated in the preceding articles [217] regarding the fate of the privilege of issue, which is an attribute of sovereignty, are obviously also valid in cases where a State ceases to exist as a result of partition or absorption, with the slight difference, due to the radical nature of the situation concerned, that the privilege of issue can naturally in any event be exercised only by the successor State by reason of the complete disappearance of the predecessor State.

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

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

[217] See above, paras. 5-7 of the commentary to article 12; paras. 1 and 3 of the commentary to article 16; and the commentary to article 20.

(2) 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 disappearance of Czechoslovakia. 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 12 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. However, those were cases of forced and unlawful territorial transfers.

Article 25. Public funds and Treasury

1. The successor State shall receive the public funds and the Treasury belonging to the absorbed State in their entirety, irrespective of where the assets in question are situated. It shall assume responsibility for the obligations relating thereto in so far as the rules applying to succession to the public debt permit.

2. In the event of partition of a State among two or more pre-existing States, each of them shall succeed to a portion, which shall be determined by treaty, of the public funds and the Treasury.

COMMENTARY

(1) Paragraph 1 of article 25 is perfectly logical. Since the absorbed State no longer exists, its public funds and Treasury in their entirety can only pass to the State which benefited from its extinction. After the *Anschluss* of 1938—to take an example of forced disappearance of a State—all Austria's assets, of whatever kind, passed to the Third Reich.

Furthermore, the paragraph could only refer to the rules concerning succession in respect of the public debt for guidance on problems connected with obligations involved in succession to public funds and the Treasury.

(2) In the event that the predecessor State is totally dismembered, with each of its parts being joined to various pre-existing States, the rule suggested in paragraph 2 of this article very prudently refers to agreements concluded among the successor States involved in the partition. All that can be said is that each State succeeds to a portion of the public funds and Treasury of the former State.

Article 26. Archives and public libraries

1. Ownership of archives and public documents of every kind, and public libraries, belonging to the absorbed State shall be transferred to the successor State, irrespective of where such property is situated.

2. Archives and public documents of every kind, and public libraries, belonging to the State partitioned among two or more others shall be apportioned between the successor States with particular regard to the link existing between such property and the territory transferred to each State.

COMMENTARY

(1) Paragraph 1 of article 26, states a simple rule. The extinction of the absorbed State leaves the successor State full freedom to increase its patrimony by the addition of all public property, including archives and documents, irrespective of where such property is situated. In annexing Ethiopia in 1936, or Albania in 1939, Italy had succeeded to all the public property of these two countries.

(2) The problem of time-limits for handing over archives does not arise in the same way as in other types of succession; since the predecessor State no longer exists, it remains only for the successor State to take possession of the archives, except for those which are situated in a third State. Similarly, the question of the non-compensatory nature of the transfer is no longer relevant because of the disappearance of the predecessor State.

(3) Draft article 26, paragraph 2, covers the case of a State's extinction because of its partition among two or more others. In that event, the archives must normally be apportioned with due regard to the link existing between them and the part of territory received by each State. Paragraph 2 is conceived in the same spirit as its counterparts in the two preceding articles.

Article 27. Property situated outside the absorbed or partitioned territory

1. Subject to the application of the rules relating to recognition, ownership of all public property of the State that has disappeared which is situated outside its territory shall devolve to the successor State.

2. In the event of total dismemberment of a State in favour of two or more other pre-existing States, property situated outside the State that has disappeared shall be shared equitably among the successor States.

COMMENTARY

(1) Writers take the view that the absorbed or partitioned State no longer has the legal capacity to own property and that its property abroad would become ownerless if it were not transferred to the successor State. Consequently, some writers feel that there would be no reason for refusing to assign such property to the successor State.

(2) This reasoning is not wholly satisfactory. Abandonment of the property is not *the reason* for the *right* to succeed; at the most, it is *the occasion* for it. After all, ownerless property may be appropriated by anyone, and not necessarily by the successor. Indeed, if abandonment were the only consideration, it might seem more natural, or at least more expedient, to assign the property to the third State in whose territory it is situated.

In fact, State succession sets off a process of transfers of rights which must definitely be effected in favour of the successor State, and not at all in favour of the predecessor State or the third State.

(3) Judicial decisions sometimes seem not to have followed the rule of devolution to the successor State of all the patrimony of the State that has disappeared, because a problem of recognition arose.

The foreign State in whose territory the property claimed by the successor State is situated usually allows the claim only if it has recognized the successor State *de jure*. This can be seen from a judgement of the Court of Appeal of England [218] After the annexation of Ethiopia by Italy in 1936, Emperor Haile Selassie claimed from a cable and wireless company sums which it owed to him. The company pleaded in defence that the debt owed to the Emperor in his sovereign capacity had passed into the patrimony of the Italian State which had succeeded the sovereign, who had been divested of all public property.

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

(5) Emperor Haile Selassie was equally unsuccessful in the French courts on another occasion. In his sovereign capacity, he was the holder of 8,000 shares of the Franco-Ethiopian Djibouti-Addis Ababa Railway Company, registered in the name of the Ethiopian Government; he wanted to convert the shares into bearer securities and to cash the coupons which had matured. The Italian Government lodged an objection with the Company's head office in Paris, requesting that the Emperor should be prohibited from selling, transferring or ceding the securities, which it claimed should revert to the successor State. The *juge des référés* of the Tribunal de la Seine, to whom the displaced sovereign applied for an order barring the objection of the Italian Government, declared that he had no jurisdiction in the case of an act of sovereignty by Italy.[219] The practical effect of this decision was to leave the Italian Government in ownership of the securities, which reverted to it despite an appeal by the Emperor Haile Selassie. The original decision was confirmed on appeal [220] and, although the ruling again dealt solely with the question of jurisdiction, the result was to leave the successor State the ownership of public property of the predecessor State situated abroad. Thus, the two decisions had the indirect effect of sanctioning the principle of the transfer of public property.

(6) However, in all these situations of total dismemberment, absorption, incorporation and partition, the main problem—over and above questions of recognition—undoubtedly remains that of situations not in conformity "with international law and, in particular, the principles of international law embodied in the Charter of the United Nations".[221]

(7) The position taken by certain Powers in the case of the annexation of Ethiopia may be compared to that taken by them in the matter of the incorporation of the Baltic States in the USSR.[222] That incorporation was not recognized by some countries, including the United Kingdom and the United States, which refused to accept the Soviet Socialist Republics as the successors to those States in the case of property situated abroad. The Western countries which did not recognize the incorporation continued for a number of years to accept the credentials of the former representatives of those States, whom they recognized as possessing the right of ownership, or at least of management, over property situated outside the frontiers of the Baltic Republics. For a long time, premises of legations and consulates, and Baltic ships, [223] were not recognized as being the property of the successors. The situation was normalized later.

Professor Guggenheim reports the decision of the Swiss Federal Council of 15 November 1946 [224]

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

[219] One of the reasons given in the decision was:

"The *Juge des référés* cannot pass judgement on the validity of the objections without resolving, at least implicitly, the dispute regarding the ownership of the securities, which is an extremely weighty matter involving principles of public international law and of private law that are manifestly outside his jurisdiction" (*Tribunal civil de la Seine, ordonnance de référé* of the President of the Tribunal, dated 2 November 1937, *Gazette du Palais* 16 December 1937; commentary in Ch. Rousseau, "Le conflit italo-ethiopien, *Revue générale de droit international public* (Paris), 3rd series, vol. XII, No. 1 (Jan.-Feb. 1938), pp. 98-99; and *ibid.*, 3rd series, vol. XIII, No. 4 (July-Aug. 1939), pp. 445-447).

[220] Appeals Court of Paris, Haile Selassie *v.* Italian State, 1 February 1939; *Gazette des tribunaux*, 18 March 1939; *Gazette du Palais*, 11 April 1939; *Revue générale de droit international public* (Paris), 3rd series, vol. XVIII, No. 1947), p. 248. In addition to its own statement of reasons, the Court repeated word for word the statement of reasons given by the *juge des référés* (quoted in preceding foot-note).

[221] See article 2 above.

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

[223] Eleven ships flying the flag of the Baltic nations remained in United States ports for a long time as "refugees". See H. W. Briggs, "Non-recognition in the Courts: the Ships of the Baltic Republics", *American Journal of International Law* (Washington, D.C.), vol. 37, No. 4 (October 1943), pp. 585-596. The United Kingdom had requisitioned 34 Baltic ships during the Second World War, but entered into negotiations on the subject with the USSR, which it finally recognized as the owner of the ships.

[224] Switzerland, *Rapport du Conseil fédéral à l'Assemblée fédérale sur sa gestion en 1946*, No. 5231, 1 April 1947, p. 119.

placing under the trusteeship of the Confederation the public property of the Baltic States, as well as the archives of their former diplomatic missions in Switzerland. those missions having ceased to be recognized as from 1 January 1941.[225]

(8) In drafting paragraph 2 of the article under consideration, the Special Rapporteur took into consideration situations such as arose following the various partitions of Poland among several neighbouring States. He will supply later some specific information regarding the devolution of public property situated outside the territory of partitioned Poland.

SECTION 5. SECESSION OR SEPARATION OF ONE OR MORE PARTS OF ONE OR MORE STATES

Article 28. Currency and the privilege of issue

1. The privilege of issue shall belong to the successor State throughout the detached territory or territories.

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

3. In consideration of the foregoing, the successor State shall assume responsibility for the exchange of the former monetary instruments, with all the legal consequences which this substitution of currency entails.

COMMENTARY

(1) Article 28 is similar to article 16, which deals with currency and the privilege of issue in the case of the emergence of a "newly-independent State". That should not be surprising, as cases of secession or separation have been treated separately from cases of decolonization for purely methodological reasons.[226] Accordingly, for the sake of convenience the Special Rapporteur refers the reader to his commentary on article 16, at least as regards considerations of a general nature, which apply equally to that article and to article 28.

(2) When Czechoslovakia was established after the First World War as a result of the detachment of several territories of the former Austro-Hungarian empire, 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.

(3) The Polish State, reconstituted after the First World War from territories recovered from Germany, Austria, Hungary and Russia, introduced the złoty, a new national currency, without initially prohibiting the circulation of the currencies formerly in use. Accordingly, for a time four different currencies were in circulation simultaneously in Poland. Subsequently, various legislative measures required the exchange of German marks, Russian roubles and Austro-Hungarian crowns [227] or declared that those currencies had lost their value as legal tender.[228]

Article 29. Public funds and Treasury

1. Irrespective of their geographical location, public funds and Treasury which are proper to the detached territory shall not be affected by the change of sovereignty.

2. The State fortune—its public funds and Treasury assets—shall be apportioned between the predecessor State and the successor State, due regard being had to the criteria of viability of each of the States.

COMMENTARY

(1) Paragraph 1 of article 29 states a rule which is followed in nearly all cases of State succession. There is no apparent reason why the public property of the detached territory, in particular its assets, its Treasury and its own funds, should not remain its property. Paragraph 2, on the other hand, deals with the fortune. The part of the territory transferred may be fairly substantial and there is no reason why the remaining territory alone should retain the public funds and the Treasury in their entirety. It therefore seemed appropriate to provide for this property to be apportioned between the predecessor State and the secessionist State. That is also why the Special Rapporteur considered that *the viability of each of the States* must be the basic criterion.

(2) The most recent case of secession is that of Bangladesh. However, it has not yet been possible to obtain much information regarding the practice followed in this case.

Article 30. Archives and public libraries

1. Archives and public documents of every kind relating directly or belonging to a territory which has become detached in order to form a separate State, and public libraries of that State, shall, irrespective of where they are situated, be transferred to the latter 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 or sovereignty of the successor State.

COMMENTARY

(1) This article is identical with articles 14 and 18 suggested above to cover cases of partial transfer of territory and emergence of a newly independent State, respectively. Accordingly, the Special Rapporteur refers the reader to the commentaries on these articles, as the situation in all these cases is basically the same, at least in so far as concerns archives and public libraries.

(2) The territories which were detached from the Austro-Hungarian empire to form new States—such as Czecho-

[225] P. Guggenheim, *op. cit.*, p. 466, note 1.

[226] See paras. 33 and 34 above. These are methodological reasons at least in the case of succession to public property. They could prove more complex in the case of succession to public debts.

[227] See, in particular, the Act of 9 May 1919.

[228] See, in particular, the Act of 29 April 1920.

slovakia—after the First World War arranged for the archives concerning them to be handed over to them.[229] Yugoslavia and Czechoslovakia subsequently obtained from Hungary, after the Second World War, by the Treaty of Peace of 1947, all historical archives which had come into being under the Austro-Hungarian monarchy between 1848 and 1919 in those territories. Under the same Treaty, Yugoslavia was also to receive from Hungary the archives concerning Illyria, which dated from the eighteenth century.[230]

(3) Article 11, paragraph 1, of the same Treaty specifically states that the detached territory which had formed a State, such as Czechoslovakia, was entitled to the objects "constituting [its] cultural heritage . . . *which originated in those territories* *"; thus, the article was based on the link existing between the archives and the territory, which explains the expression "*archives relating directly to a territory*" suggested by the Special Rapporteur in the draft article under consideration.

(4) In the same case, moreover, paragraph 2 of the same article rightly stipulates that Czechoslovakia would not be entitled to archives or objects "acquired by purchase, gift or legacy and original works of Hungarians", which implies *a contrario* that objects acquired by the Czechoslovak territory should revert to it. That explains the expression "archives belonging to a territory" which the Special Rapporteur has used in his draft. This property was in fact returned to Czechoslovakia.[231]

(5) The aforementioned article 11 of the Treaty of Peace with Hungary of 10 February 1947 is one of the most specific with regard to time-limits for the handing over of archives: it establishes a veritable time-table within a maximum time-limit of 18 months.

Article 31. Property situated outside the detached territory

1. Where a State comes into being as a result of the detachment of a part of the territory of one or more States, the ownership of public property belonging to the said constituent territory or territories which is situated outside their frontiers shall not be affected by such change or changes of sovereignty.

2. Public property belonging to the predecessor State which is situated in a third State shall become the property of the successor State in proportion to the contribution of the detached territory to the creation of such property.

COMMENTARY

(1) Article 31, paragraph 1, states a rule which does not appear to give rise to any doubts, although the courts left room for some uncertainty in a case known as the case of Irish funds deposited in the United States of America.[232]

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

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

An Irish court upheld this claim, ruling that the Government of the Irish Free State was "absolutely entitled to all the property and assets of the [*de facto*] Revolutionary Government upon which as a foundation it had been established".[233]

(2) However, an American court dismissed the claim. The two judgements to this effect rendered by the Supreme Court of New York (New York County) [234] stated that, although the case involved a problem of succession of State or government, the Court considered that the Irish Free State was the successor of the British State and that consequently the Government of the Free State was not the successor of the "insurrectionary government", which was only a political organization and not a government recognized as such by the British authorities or by any foreign State.

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

(3) The reader will recall the *McRae case* mentioned earlier,[235] which, although it related to the dissolution of unions, can also be considered from the standpoint

[229] Article 93 of the Treaty of Saint-Germain-en-Laye (*British and Foreign State Papers, 1919*, vol. 112 *(op. cit.)*, p. 361) and article 77 of the Treaty of Trianon (*ibid., 1922*, vol. 113, *(op. cit.)*, p. 518).

[230] Article 11 of the Treaty of Peace with Hungary of 10 February 1947 (United Nations, *Treaty Series*, vol. 41, p. 178).

[231] The same provisions were applied in the case of Yugoslavia in article 12 of the Treaty of 10 February 1947 already referred to (see note 148 above).

[232] See E. D. Dickson, "The case of the Irish Republic's funds", *American Journal of International Law* (Washington (D. C.), vol. 21, No. 4 (October 1927), pp. 747-753; J. W. Garner, "A question of State succession", *ibid.*, pp. 753-757; D. P. O'Connell, *State Succession... (op. cit.)*, pp. 208-209; C. K. Uren, "The succession of the Irish Free State", *Michigan Law Review* (Ann Arbor, Mich.), vol. XXVIII (1929-1930), 1930, p. 149; Ch. Rousseau, *Cours de droit international public—Les transformations territoriales... (op. cit.)*, pp. 145-146.

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

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

[235] See above, paras. 3 and 5 of the commentary to article 23.

of secession. It was, however, an attempt at separation which failed.

(4) The diplomatic practice followed by Poland when it was reconstituted as a State upon recovering territories from Russia, Austria-Hungary and Germany was, as is known, to claim ownership, both within its boundaries and abroad, of property which had belonged to the territories which it recovered.

(5) Paragraph 2 of the article would apply to cases of property belonging to the predecessor *State or States* part or parts of whose territory had been detached to form the new State. Where the constituent territory or territories contributed to the constitution of property situated in a third State, they are entitled to claim their share of that property, which would be determined on the basis of their contribution.

(6) However, this rule apparently has not always been followed in diplomatic practice. In considering the case of the dismemberment of the territories of the Habsburg dynasty, there is observable, *inter alia* a type of secession, in that Czechoslovakia, for example, was formed from certain territories which were detached from the Empire.

(7) An arbitral award was in fact delivered at Czechoslovakia's request in a case involving the cession of vessels and tugs for navigation on the Danube.[236]

In the course of the proceedings, Czechoslovakia had submitted a claim to ownership of a part of the property of certain shipping companies which had belonged to the Hungarian monarchy and to the Austrian Empire or received a subvention from them, on the ground that these interests were bought with money obtained from all the countries forming parts of the former Austrian Empire and of the former Hungarian Monarchy, and that such countries contributed thereto in proportion to the taxes paid by them, and therefore, were to the same proportionate extent the owners of the property.[237]

(8) The position of Austria and Hungary was that, in the first place, the property was not *public* property, which alone could pass to the successor States, and, in the second place, even admitting that it did have such status because of the varying degree of financial participation by the public authorities, "*the Treaties themselves do not give Czecho-Slovakia the right to State property except to such property situated in Czecho-Slovakia* *".[238]

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

V. PROVISIONS RELATING TO PUBLIC ESTABLISHMENTS

Article 32. Definition of public establishments

For the purposes of the present articles, "public establishments" means those bodies or enterprises which engage in an economic activity or provide a public service and which are of a public or public utility character.

COMMENTARY

(1) As the domestic legislation of many States is relatively vague in its definition of "public establishments" or equivalent bodies, it would seem preferable to define such institutions less by their designation in domestic legislative texts than by the objective nature of their functions.

Public establishments exist in almost all sectors of human activity: educational sector (universities, colleges, secondary schools, research institutions, museums, theatres, libraries); social sector (hospitals, social welfare and assistance agencies); financial sector (institutions of issue, banks, savings banks, Treasuries); communications sector (railways, port establishments, airports); etc.[239]

The activities of these bodies vary in scope according to the country. However, they all have the characteristic either of providing or assuring a public service or of engaging in a public activity within the framework of the national economy.

A. *The public establishment administers a public service*

(2) The public establishment, which is set up to administer a public service, is for that purpose provided with a statute determining its structure and mode of operation. Its creation, like its abolition, is closely bound up with that of the public service in question. The establishment's patrimony is made up of property which may belong to the State in whole or in part; in the latter case, the remainder of the property belongs to various territorial authorities (municipalities, *départements*, districts, *arrondissements*, etc.) or to the public establishment itself. The public establishment is in fact a body corporate. Its *public character* derives from the fact that it provides a

[236] Case of the cession of vessels and tugs for navigation on the Danube, Allied Powers (Greece, Romania, Serb-Croat-Slovene Kingdom, Czechoslovakia) *v.* Germany, Austria, Hungary and Bulgaria (Decision: Paris: 2 August 1921, Arbitrator: Walker D. Hines (USA)). (See United Nations, *Reports of International Arbitral Awards*, vol. I (United Nations publication, Sales No. 1948. V.2), pp. 97-212.)

[237] *Ibid.*, p. 120.

[238] *Ibid.*, pp. 120-121. The reference was to article 208 of the Treaty of Saint-Germain-en-Laye (*British and Foreign State Papers, 1919*, vol. 112 *(op. cit.)*, pp. 412-414), and article 91 of the Treaty of Trianon (*ibid.*, 1922, vol. 113 *(op. cit.)*, pp. 564-565).

[239] Like French administrative law, German law makes a distinction between public establishment ("öffentliche Anstalt") and public enterprise ("öffentliche Unternehmung"). Anglo-Saxon law hardly seems to make any distinction between "public corporation", "enterprise", "undertaking" and "public undertaking" or "public utility undertaking". Spain has "institutos públicos", Italy has "enti pubblici" and "imprese pubbliche", Latin America has "autarquias" and Portugal has "estabelecimentos publicos" or "fiscalias". See W. Friedmann, *The Public Corporation: A Comparative Symposium* (University of Toronto School of Law, Comparative Law Series, vol. 1, London, Stevens, 1954).

public service to a particular population or a segment of that population.

B. *The public establishment may engage in an economic activity*

(3) The public establishment of an industrial or commercial character, which takes a variety of forms and appellations according to its origins and purpose, generally has a different legal régime from that of the first type of public establishment. It enjoys a greater measure of independence in relation to the Government than does the first type, basing its organization and administration on private law procedures. The establishment's patrimony is made up of property which may belong to the State, to local authorities, to the establishment itself and on occasion, in the case of mixed companies, to private individuals. In any event, the public establishment in question clearly has a public character in these cases too.

C. *The establishment of public utility or general interest*

(4) An establishment in this particular category does not administer a public service but engages in an activity which is sufficiently important for the population to be regarded as being "of general interest" or "of public utility". A public establishment in this category, which is set up by private initiative, may be of two kinds: it may engage in activities substantially similar to those of a public service where the latter does not hold a complete monopoly on activities of that type; it may provide a special service to a group where the Government feels that it is unnecessary to set up a public service to cater for the needs of such a small group, although it intervenes to recognize the public utility character of the establishment which caters for such needs.

(5) The Government extends help or assistance to the private public utility establishment in a variety of forms (subsidies, preferential customs or tax treatment, special pricing system, monopoly status, public authority privileges such a expropriation or the levying of taxes). In return for such assistance, the Government is accorded supervisory authority over the establishment.

D. *The public or public utility character*

(6) Despite the variety of the legal régimes to which they are subject, the three categories of establishment mentioned above have one feature in common: *their public or public utility character.* The existence of this characteristic can be determined by the *link the establishment and the territory*—in other words, according to the relationship between the body and the population and to the link between the establishment and the economy of the territory.

1. *Link with the population*

(7) The establishment is intended to meet *public needs* in a particular sector. In the case relating to the interpretation of article 260 of the Treaty of Versailles submitted to arbitrator Beichmann, the Reparation Commission took the view that the link between the establishment and the population was of paramount importance for the purpose of attributing to an undertaking the character of a public utility. Such an undertaking should " . . . serve the *great majority of consumers* * in a fairly sizable expanse of territory" [240] and "*satisfy an essential need of a community by collective means of distribution*"* [241] or, again, provide "in a fairly extensive territorial area, in order to satisfy a *collective need*,* a service considered to be of general utility in all modern civilized communities".[242]

Arbitrator Beichmann also emphasized this link by concluding that public establishments "express the idea of a special utility for the general public and sometimes also of direct use by the public".[243]

2. *Link with the economy of the territory*

(8) By its activities, the establishment may "supply industrial and commercial undertakings scattered throughout the territory and furnish them with raw materials".[244]

(9) The dual link with the economy and the population of the territory highlights the importance in the establishment or undertaking of the *objective element* constituted by their public utility character in general and conveniently relegates to a secondary position the excessive variety of criteria for a definition which may be derived from the municipal law of each State. Arbitrator Beichmann did in fact draw attention to a number of differences [245] in the designation of the body in question between one municipal juridical order and another.[246]

E. *Criteria for a definition*

(10) For these reasons, a tendency can be observed for international judicial decisions to reject criteria for a definition which are derived from municipal law in the event of a change of sovereignty affecting a territory. Three examples of this approach may be cited.

1. *Arbitral award concerning the interpretation of article 260 of the Treaty of Versailles*

(11) In this case, the parties to the Treaty of Versailles held conflicting views concerning the true meaning of the expression "public utility undertaking" used in article 260 of the Treaty, each of the parties attempting

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[240] 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 2145*a* (Paris, 1924), and United Nations, *Reports of International Arbitral Awards*, vol. I *(op. cit.)*, p. 455.

[241] *Ibid.*, p. 456.

[242] *Ibid.*, p. 455. The Commission added that "utilization by the public is an *important element*†" in a definition (*ibid.*, p. 462).

[243] *Ibid.*, p. 468.

[244] *Ibid.*, p. 455.

[245] *Ibid.*, p. 460 and foot-note.

[246] Even where the body is recognized as having a public character, its real nature is often the subject of learned disputes between jurists of various schools of thought within a particular juridical order (public establishment, public undertaking, public establishment of an industrial or commercial nature, public service, public body, public utility undertaking, etc.).

to win acceptance for the more or less broad interpretation, given to these terms in its own administrative law. After analysing the various arguments advanced, Arbitrator Beichmann expressed the view that the expressions "*entreprise d'utilité publique*" and "public utility undertaking" contained in the article applicable to the calculation of German reperations "*could not be regarded as having been taken from English or French legal vocabulary or as being related to any expression used in the administrative law of either country*".*[247] He also took the view that the expression "public utility undertaking" could not necessarily be linked to the concept of "devolution of public authority or [to] other criteria of a juridical nature such as those contained in the definition in the German Government's conclusions".[248]

(12) After rejecting all interpretations of the disputed expression contained in municipal law, the arbitrator concluded by expressing the opinion that its meaning, and hence its definition, should accord with the meaning which it had in everyday language.

2. *Decision of the United Nations Tribunal in Libya*

(13) The Tribunal, which was set up by United Nations General Assembly resolution 388 (V) of 15 December 1950, had to decide, in connexion with the transfer to Libya of property belonging to the Italian State, whether a number of institutions formerly governed by Italian law could be deemed to be "public establishments" within the meaning of article 1 of annex XIV to the Peace Treaty of 10 February 1947. The agent of the Italian Government had contended that the Tribunal's decisions must relate to the character of an "ente pubblico" in the strict sense of the term and in conformity with the meaning of that term in Italian legislation.

(14) The Tribunal rejected this view, stating that it was "*not bound by Italian legislation and case law.** The Tribunal will therefore consider this question by freely appraising the various factors in each individual case".[249] In the opinion of the Tribunal, the parties "purposely chose a term with a general meaning, broader than the term '*ente pubblico*' in Italian law".[250]

3. *Decision of the P.C.I.J. in a case relating to a Hungarian public university establishment* [251]

(15) It will be recalled that, in the case of property belonging to the Peter Pázmány University of Budapest and situated in territory ceded by Hungary to Czechoslovakia, the Permanent Court of International Justice decided that it "*has [had] no need to rely upon this interpretation of Hungarian law.** It is content to observe that the distinction between public and private property, in the sense of the Czechoslovak Government's argument, is neither recognized nor applied by the Treaty of Trianon".[252]

(16) Thus, international judicial tribunals do not regard themselves as bound by municipal law; the status of a particular public establishment should be appraised on the basis of its various individual features or the wish expressed by the contracting parties.

F. *Determination by treaty*

(17) Doubtless because the definition or "public establishments or bodies" is a difficult question, the predecessor State and the successor State sometimes prefer to list such establishments or bodies in treaty form in the devolution agreements which they conclude. This procedure is followed frequently in the case of all types of succession but has become common practice in cases of decolonization.

In particular, France concluded with the French-speaking African States many agreements regulating the future status of "*French public bodies*" and certain "*French administrative entities*" situated in those countries. However, no attempt should be made to find in these treaty provisions elements for a strict definition of public establishments or for determining their property or the legal nature of their rights over such property, or reasons of principle justifying the maintenance of such establishments within the patrimony of the predecessor State. "The concept of the French public body", writes Mr. Daniel Bardonnet, "is quite unspecific from the legal standpoint. It seldom involves ... more than the existence of body corporate status and financial independence. In practice, it is merely a convenient tag to cover a rather motley assortment of public and semi-public bodies and bodies of public interest ...".[253]

Article 33. Public establishments of the transferred territory

Public establishments which belong entirely to the transferred territory shall not be affected by the mere fact of the change of sovereignty.

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[247] United Nations, *Reports of International Arbitral Awards*, vol. I *(op. cit.)*, p. 467.

[248] *Ibid.*

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

[250] *Ibid.*

[251] See *Yearbook...1970*, vol. II, p. 140, document A/CN.4/226, part two, paras. 27-30 of the commentary to article 1.

[252] Judgement of 15 December 1933, "Appeal from a judgement of the Hungaro-Czechoslovak Mixed Arbitral Tribunal (The Peter Pázmány University *v.* the State of Czechoslovakia)", *P.C.I.J.*, Series A/B, No. 61, pp. 236-237.

[253] D. Bardonnet, *op. cit.*, p. 601. After an unusually detailed analysis, the writer expressed the opinion, *inter alia*, that "the list of French public bodies, as contained in the (Franco-Malagasy) liquidation statement of 18 April 1961 should be reviewed. It is irregular for the list to include joint-stock companies belonging to Madagascar itself, such as the Société d'Energie de Madagascar... or the Société des pétroles de Madagascar. Similarly, the manager of the Compagnie française pour le développement des fibres textiles went so far as to request that the company's name should be removed from the list, since in his view that establishment was purely private in character" (*ibid.*, p. 602, foot-note 146).

COMMENTARY

(1) The legal status of public bodies or corporations or of public enterprises and establishments which are proper to the territory affected by the change of sovereignty cannot be affected by the succession of States as such. Irrespective of the type of succession, the patrimony of the territory retains the status which it had prior to the change.

(2) The situation is clear for the cases of (*a*) partial transfer of territory, (*b*) a newly independent State and (*c*) secession or separation of part of the territory of a State. In the event of (*d*), the uniting of States, the rule seems to be as fully applicable as in the other cases: the public establishments of each of the uniting States will remain the property of those States, save where treaty provisions state the contrary. In the event of dissolution of the union, if each State constituting the union owned public establishments in its territory, it is evident that, *a fortiori*, it cannot be divested of ownership of such establishments when the union is dissolved.

The only remaining possibility is the absorption of a State or its partition among several others: this is a case in which the totality of the transferred territory is coextensive with that of the predecessor State. In other words, "public establishments which belong entirely to the transferred territory", that is to say, bodies owned by the territory itself, are in this case nothing but establishments belonging to the absorbed or partitioned *State*, and we must therefore refer to the case considered in article 34, relating to *State property* in public establishments.

(3) There is no lack of examples for each type of succession; however, to avoid making unduly long comment aries on an article which is self-evident in any case, we shall confine ourselves here to considering the case of decolonization alone, and, within decolonization, to the sole case of North Africa.

(4) For example, the French-Moroccan protocol concerning the distribution of public services between Morocco and France, signed at Rabat on 11 February 1956, specified clearly, even in its title, that during the protectorate the French *Résidence générale* had possessed in Morocco only "*management powers*" over certain public establishments, the Moroccan ownership of which was thus recognized. Radio-Maroc, the State Printing Office and the educational services were consequently taken over once more by the Sherifian Government. In this connexion the French Secretary of State for Tunisian and Moroccan Affairs subsequently informed a member of the French Parliament who inquired about the restoration of the educational services that "All of those services have always been Sherifian at the administrative and budgetary levels".[254] Later he added that "In Morocco the buildings and equipment of Radio-Maroc, paid for from the Moroccan budget, have always belonged to the Sherifian State"[255] but that the same was not true of "*the installations*" of Radio-Tunis.

(5) In fact, the French-Tunisian Agreement concerning Broadcasting of 29 August 1956 provided that beginning on 31 March 1957, "all of the land, buildings, premises and installations belong to Radiodiffusion *française* in Tunisia shall be transferred with full rights of ownership to the Tunisian State through the latter's purchasing them within the framework of property negotiations between the two countries". The Agreement would enable the Tunisian Government to carry on for itself as from 31 March 1957 "the management, operation and equipping of Radiotélévision tunisienne".

(6) Public establishments which were the property of Algeria were retained by the latter on its accession to independence.

The Declaration of Principles concerning Economic and Financial Co-operation, dated 19 March 1962,[256] stated in article 18 that "Algeria shall assume the obligations and *enjoy the rights* * contracted on behalf of itself or of *Algerian* * public establishments by the competent French authorities. But Algeria provisionally left to France the use of certain services for the needs of technical and cultural co-operation between the two countries, as happened also between France and the other countries of the Maghreb or the African and Malagasy States.[257]

Article 34. Property of the State in public establishments

The successor State shall be automatically and fully subrogated to the patrimonial rights which the predecessor State possesses in public establishments situated in the transferred territory.

COMMENTARY

(1) The rule suggested above is simple, clear and logical, but it must be admitted—that it has been applied only intermittently. The Special Rapporteur ventures, however, to submit it to the Commission, leaving the latter to judge whether the uncertainty of the use of the rule in practice appears to have the effect of annulling it or of requiring that it be amended. A study of State practice provides us with equally numerous examples of (*a*) *automatic and complete succession* of the successor State to

[254] Reply by the Secretary of State for Tunisian and Moroccan Affairs to a written question from Mr. Michel Debré, No. 6663 (France, *Journal officiel de la République française, Débats parlementaires: Conseil de la République* (Paris), 20 June 1956, year 1956, No. 37 C. R., p. 1191).

[255] Reply by the Secretary of State, Office of the Prime Minister, to an oral question from Mr. Michel Debré (*ibid.*, 16 January 1957, year 1957, No. 1 C. R., p. 7).

[256] United Nations, *Treaty Series*, vol. 507, p. 65.

[257] Article 2 of the Declaration of Principles concerning Cultural Co-operation stated in this connexion that "France *will retain*† a certain number of educational establishments in Algeria" (*ibid.*, p. 77). In pursuance of that article, the French-Algerian Protocol of 7 September 1962 concerning the Distribution of Educational Establishments provided for "a provisional distribution" of those establishments and included an annex entitled "List of establishments *retained*† by France". Under another protocol, of 11 June 1963, France was to "retain" certain Algerian establishments, while Algeria was to "temporarily entrust the management of certain establishments" to a Joint Scientific Research Council (article 1 of the Protocol).

the property of the State in public establishments, (*b*) *automatic but limited succession* to the property of establishments situated *in the territory* affected by the change of sovereignty, (*c*) *succession on condition of purchase*, and (*d*) *temporary retention* of such property by the predecessor State.

(2) It would seem, however, that this indicates, not that the principle of succession is set aside, but merely that its practical application is subject to certain restrictions in treaties. Even when two States decide to deviate from the principle, such action is also a way of recognizing its existence: the High Contracting Parties "*agree to replace the property settlement based on the nature of the appurtenances* * by a global settlement based on equity and satisfying their respective needs".[258]

A. *Automatic and complete succession*

(3) In 1871, Germany took over the rights and property belonging to France in respect of the part of the railway network of the *Compagnie de l'Est* situated in Alsace-Lorraine.[259] Bismarck had in fact decided, after the conclusion of the Treaty of Peace of Frankfurt dated 10 May 1871,[260] to retain the lines in Alsace-Lorraine as *property of the State*. Since France protested against that decision, Germany consented to pay compensation, but the completely fictitious nature of the latter leads to the conclusion that this was a concealed case of automatic and complete succession. Furthermore, it was the company and not France that had been compensated. France had repurchased its rights from the company in order to give them to Germany.

(4) The Treaty of Frankfurt contained in fact three additional articles, two of which related to the problem of the lines of the Compagnie de l'Est. The German Empire required France to repurchase the concessions granted to the company in Alsace-Lorraine, and was required in exchange to pay France a lump sum which it merely deducted from the war reparations that it had exacted from France (325 million out of 5,000 million gold francs).

(5) When France regained Alsace-Lorraine from Germany after the First World War, there was an automatic and complete succession, considered to be restitution exclusive of any compensation. France regained not only the railway network in the East, but also all the rolling-stock after its representative had declared at the Peace Conference that the question was

> purely a question relating to a territorial cession and in no way a question of compensation. France reclaims the rolling-stock belonging to the network in Alsace-Lorraine as an accessory of the soil of Alsace-Lorraine, *a kind of rolling public domain belonging to the soil by virtue of a kind of right of succession* *.[261, 262]

(6) Under the Treaty of Peace with Italy of 10 February 1947 (annex X, para. 1), "the Free Territory of Trieste [received], *without payment, Italian State and para-statal property* * within the Free Territory".[263] The following were considered as State or para-statal property: "movable and immovable property of the Italian State, of local authorities and of public institutions and publicly owned companies and associations, as well as movable and immovable property formerly belonging to the Fascist Party or its auxiliary organizations".[264]

(7) The Treaty of Peace between the USSR and Finland dated 12 March 1940, which provided for reciprocal territorial cessions between those two countries, included an annexed protocol under which various kinds of property of economic and military importance (including manufacturing enterprises, telegraph and electric power stations, aerodromes and warehouses), were required to be handed over intact by each party to the other.[265]

(8) After its restoration in 1918, Poland expected to regain all the Russian, German and Austro-Hungarian property situated in the territories in which it had been re-established. This is a case which goes beyond automatic succession without payment to the property of the State in public enterprises or enterprises of public

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[258] Article 31 of the Franco-Malagasy agreement of 27 June 1960 concerning economic and financial co-operation (approved in Madagascar by an Act of 5 July 1960 and in France by an Act of 18 July 1960). (See France, *Journal officiel de la République française, Lois et décrets* (Paris), 20 July 1960, 92nd year, No. 167, p. 6615.)

[259] This case of partial transfer of territory does not appear to have involved the situation considered in article 10 relating solely to *rights in respect of the authority to grant concessions*.

[260] For reference, see above note 125.

[261] Peace Conference (1919-1920), *Recueil des actes de la Conférence de la paix* (Paris, Imprimerie Nationale, 1922), part IV (Commissions of the Conference), B (General questions), (5) Commission for the International Régime for Ports, Waterways and Railways, meeting of 21 March 1919, extracts from the records No. 14, p. 122.

[262] "*Mr. Armitage Smith (British Empire):* ... The peace preliminaries would stipulate that Germany's public domain should be ceded without payment. The allies would then consider whether the value of that domain should be deducted from the compensation to be made to the cessionary States.

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

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

"*Mr. Sergent (France)* said that France could not pay the Allies for something it received without payment from Germany." (*Ibid.*, (6) Financial Commission, First Sub-Commission, meeting of 21 March 1919, extract from the records, No. 4, pp. 130-131.

See also the reasons given for the judgement by the French Court of Cassation in Compagnie des chemins de fer d'Alsace et de Lorraine *v.* Ducreux (Cour de Cassation française, Chambre civile, judgement of 11 July 1928 (Dalloz, *Recueil hebdomadaire de jurisprudence, année 1928* (Paris, Dalloz), p. 512)).

[263] Treaty of Peace with Italy signed at Paris on 10 February 1947 (United Nations, *Treaty Series*, vol. 48, p. 209).

[264] *Ibid.* See also annex XIV ("Economic and Financial Provisions relating to Ceded Territories") (*ibid.*, p. 225), where provisions identical to those relating to the Territory of Trieste are set forth for States successors of Italy in other territories.

[265] *British and Foreign State Papers 1940-1942*, vol. 144 (London, H.M. Stationery office, 1952), p. 383. See also I. Paenson, *op. cit.*, p. 105.

utility, since Poland expected to recover even private property.[266]

(9) The Treaty of Peace signed at Bucharest on 7 May 1918 between the Central Powers and Romania,[267] stipulates in article 12 that all State property *(Staatsvermögen)* of the ceded Romanian territories shall pass to the successor States free and clear of any compensation or costs.

(10) Under United Nations General Assembly resolution 388 (V) of 15 December 1950 concerning the economic and financial provisions relating to Libya, that country was to receive, "without payment, the movable and immovable property located in Libya owned by the Italian State, either in its own name or in the name of the Italian administration of Libya". Article 1, paragraph 2, of that resolution provided for the transfer, immediately and without payment, of the public property of the State ("demanio pubblico"), the inalienable property of the State ("patrimonio indisponibile"), as well as the property of the Fascist organizations. Paragraph 3 of the same article provided, in addition, that

> the following shall be transferred on conditions to be established by special agreement between Italy and Libya: (*a*) the alienable property *(patrimonio disponibile)* of the State in Libya *and the property in Libya belonging to the autonomous agencies (aziende autonome) of the State;* (b) the rights of the State in the capital and the property of institutions, companies and associations of a public character located in Libya* *.

It is known that the United Nations Tribunal had to settle this problem of the transfer of public property to the successor State, particularly State property in organizations of a public or semi-public character.

(11) By and large the same provisions were applied in the case of Eritrea which, under General Assembly resolution 530 (VI), succeeded, automatically and without payment, to the property of the "demanio pubblico", the "patrimonio disponibile" and "indisponibile", of the Fascist Party and its organizations, and the following "*aziende autonome*": the railway of Eritrea ("Ferrovie dell'Eritrea"), the "Azienda Speciale Approvigionamenti", "the Azienda Miniere Africa Orientale" (AMAO), and the "Azienda Autonoma Strade Statali" (AASS), as well as to the "rights of the Italian State in the form of shares and *similar rights in the capital of institutions, companies and associations of a public character* *"[268] (which have their head offices in Eritrea).

(12) Algeria was to succeed to the property of the French State in the public bodies in Algeria: "Public establishments of the [French] State or companies belonging to the [French] State and responsible for the administration of Algerian public services, will be transferred to Algeria."[269] In fact, the application of the principle has given rise to various difficulties.[270]

B. *Succession limited to the property of public establishments situated in the territory*

(13) The examples cited above concerning automatic succession, without payment, to all the property of the State that might be included in the patrimony of public establishments, or their equivalent, include some instances in which the succession has been expressly limited to the case where such property is situated in the territory affected by the change of sovereignty.

(14) Thus, neither Libya nor Eritrea were able to succeed to the property of the Italian State in public establishments when such property was situated—or the operations relating to it were carried on—outside Eritrea or Libya.

As stated in General Assembly resolution 388 (V),

> where the operations of such institutions, companies and associations extend to Italy or to countries other than Libya, *Libya shall receive only those rights of the Italian State or the Italian administration which appertain to the operations in Libya* *. In cases where the Italian State or the Italian administration of Libya exercised only managerial control over such institutions, companies and associations, Libya shall have no claim to any rights in those institutions, companies or associations.[271]

(15) Similar or parallel provisions are found in devolution agreements. Article 19, of the Declaration of Principles concerning Economic and Financial Co-operation between Algeria and France provides that the transfer of public establishments of the French State "will cover the assets *applied in Algeria* * to the management of these public services".

C. *Succession on condition of purchase*

(16) When the French Establishments in India were taken over by the Indian Union, it was decided that "the French Government will place a power station at the disposal

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[266] See third report (*Yearbook...1970*, vol. II, p. 131, document A/CN.4/226), and the abundant decisions of the Polish Supreme Court. According to a judgement of that Court (Co-operative farmers in Tarnow *v.* Polish Treasury, 1923), the Polish State had taken over the Austrian State Railways by taking over supreme power in the territory in question, that is, by an act of public law (see *Yearbook...1963*, vol. II, p. 143, document A/CN.4/157, para. 434).

[267] De Martens, ed., *Nouveau Recueil général de traités* (Leipzig, Weicher, 1921), 3rd Series, vol. X, p. 856.

[268] General Assembly resolution 530 (VI) of 29 January 1952, "Economic and financial provisions relating to Eritrea", article I. This resolution is much more detailed than resolution 388 (V) relating to Libya.

[269] Article 19 of the "Declaration of Principles concerning Economic and Financial Co-operation" (for reference, see above note 256), of 19 March 1962. The fact that this article, even though it refers to a future agreement, makes no reference to whether this transfer was to be made against payment, should be interpreted as excluding any compensation or repurchase.

[270] 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, pp. 51-79. Following the occupation on 18 October 1962 by the French Army of the administrative district of Rocher Noir, constructed on land acquired by a public establishment, the CEDA (Caisse d'équipement et de développement de l'Algérie)), the Algerian side replied by stepping up its take-over of various public establishments, including Radio Algiers. The transfer to Algeria of the patrimonial aspects of the various public bodies took place progressively, following long, complex negotiations and often on condition of purchase or against compensation.

[271] Article I, para. 4, of resolution 388 (V). This paragraph was reproduced in full in article I, paragraph 2 (*f*) of resolution 530 (VI) quoted earlier in the case of Eritrea.

of the Government of India. The conditions of the purchase shall be examined by the competent authorities."[272]

(17) When France withdrew from Lebanon, the latter purchased from the former, on a lump-sum basis, property of the French State in public establishments in Lebanon, such as the telephone system, the Beirut broadcasting station and the flying control radio stations and meteorological stations.[273]

(18) The protocol of 24 September 1962 concerning technical co-operation between France and Algeria in the field of public works, transport and tourism [274] provides for the transfer of State property forming part of the patrimony of various public establishments. In particular, article 1 of the protocol provides that, "As from 1 July 1962, Algeria shall supersede France in respect of the rights and obligations attaching to the general property of the railway system" while France undertakes to "transfer" to Algeria the shares it held in the Société nationale des chemins de fer algériens (SNCFA). That was effected against payment, as in the case of other public bodies, such as Electricité et Gaz d'Algérie (EGA), Air-Algérie, and Caisse d'équipement et de développement de l'Algérie (CEDA), the property of which was to be transferred to the equivalent new Algerian body, the Caisse algérienne de développement (CAD), etc.[275]

(19) It would appear that the few examples mentioned briefly above should not be used as the basis for the formulation of rules, since that was not their purpose. Despite their relatively frequent occurrence, these examples are the product of varying circumstances of time and place, and this makes it hazardous to attempt to formulate any rule based on them.

It might in addition be pointed out that the transfer against payment was justified at times by the fact that, in the context of co-operation, the successor State and the predecessor State each undertook an evaluation of the property which it abandoned to the other. Reciprocal cessions had to be calculated for the purposes of compensation.

It should also be noted that, at least as far as decolonization is concerned, the purchase is sometimes more theoretical than real. "Payment for the succession to property", writes Mr. Gérard Fouilloux,

> is of illusory value, either because the new State does not possess the necessary financial means, *or, above all, because it tends to give rise to a dispute that is not conducive to co-operation* *.[276]

Such a dispute is a clear indication of the argument against the merits of a possible rule stating that transfers must be made against payment.

Finally, it is worth while pointing out that the payment of compensation or lump sums stipulated by various agreements relating to territorial cessions in Europe in the eighteenth and nineteenth centuries was sometimes intended, according to one writer,[277] to replace "in a way the system which would impose on the acquiring State the obligation to assume responsibility for part of the public debt relating to those territories".

D. *Temporary use of property by the predecessor State*

(20) It has happened that a predecessor State has been authorized to retain temporarily the use of public property, particularly for the purpose of establishing or administering services to implement a policy of technical or cultural co-operation with the successor State. Obviosuly, the fact that such property remains temporarily at the disposal of the predecessor State cannot constitute grounds for formulating a rule contrary to that suggested by the Special Rapporteur. It is mainly in the context of cultural co-operation that a number of public educational, research and cultural establishments have thus been retained provisionally by the predecessor State with the express agreement of the successor State. Furthermore, the very existence of such an agreement clearly proves that the successor State has a right to succeed to such property, without which it would have no capacity to assign the property referred to in the agreement.

(21) On the basis of these commentaries, it would seem possible to accept the rule suggested by the Special Rapporteur in draft article 34. It should be applicable without difficulty in the cases of partial transfer of territory, the newly independent State, and the separation or secession of territory. It is clearly not in doubt in the case of the disappearance of the predecessor State by absorption or partition. In that case, the rule applies by reason of the sheer impossibility of leaving a patrimony to a State that no longer exists. There remain the cases of the *uniting of States* and the *dissolution of a union of States*. For the purposes of the latter case it might appear necessary or useful for the Commission to effect some slight change or introduce some special provision in the proposed article. It may in fact be considered normal for a predecessor State to retain the property that it possesses in a public establishment in the case of a uniting of States. There again, however, it is all a question of the nature and degree of integration of the States in the union, and hence of treaty provisions.

Article 35. Case of two or more successor States

Where there are two or more successor States, the patrimonial rights of the predecessor State in public

[272] Article XXII of the Franco-Indian Agreement of 21 October 1954 (for reference, see above, note 115). The compensation for the purchase of this power station was fixed by a joint commission at 21.65 lakhs.

[273] Agreement between France and Lebanon concerning monetary and financial relations between the two countries, signed at Paris on 24 January 1948 (United Nations, *Treaty Series*, vol. 173, p. 99), article 8, paras. 3, 4 and 5.

[274] Algeria, *Journal officiel de la République algérienne, Ordonnances* (Algiers), 24 September 1962, First year, No. 19, p. 311; and France, *Journal officiel de la République française, Lois et décrets* (Paris), 6 October 1962, 94th year, No. 236, p. 9660.

[275] For the purchase of property of the Bank of Algeria, an institution of issue, see also *Yearbook...1971*, vol. II (Part One), p. 182, document A/CN.4/247 and Add.1, part two, third subparagraph of para. 14 of the commentary to article 7.

[276] G. Fouilloux, *loc. cit.*, p. 78.

[277] J. T. N. Dimitriu, *Le régime des biens d'Etat dans les traités* (thesis) (Paris, *Les presses modernes*, 1927), p. 38.

establishments situated in the transferred territories shall be apportioned between the successor States in accordance with the criteria of geographical location, origin of the property and the viability of the said establishments, and subject, where necessary, to equalization payments and offset.

COMMENTARY

(1) When Algeria became independent, there arose the problem of disposal of the property of the Mediterranean-Niger Railway, in which several countries were involved. In a Franco-Algerian Protocol it was decided provisionally at that time that "subject to the changes affecting the public domain as a consequence of the transfer of sovereignty, the Mediterranean-Niger Railway shall continue to be operated as a *French public establishment** until 31 December 1962".[278] Subsequently this establishment was dissolved.

(2) It would seem inadvisable to go further than the provisions of article 35 in defining the way in which the patrimonial rights which the predecessor State possesses in public establishments should be apportioned between two or more successor States. The proposed criteria for apportionment are such as to cover every eventuality. However, contrary to the possible implications of the case of the Mediterranean-Niger Railway, it is not for the predecessor State to apportion the State property between the various successor States. As Max Huber writes in a book already quoted, [279] under public law, as opposed to civil law, the successor itself gives effect to the succession by taking possession of the property involved. It is for the successor States to settle the question among themselves.[280]

(3) The future of public establishments and bodies can give rise to insuperable problems when there are two or more successor States if the criteria referred to above and the interests of each party are not carefully taken into account. The apportionment of property may well deprive the establishment of what is fundamental to its existence, and must therefore also take into account the criterion of viability of the establishment.

(4) As an appendix to these commentaries, it might perhaps be appropriate to consider, in this context, the case of *two or more third States*, which is obviously different from the case of two or more successor States, dealt with here. The former occurs when, particularly in the case of decolonization, the predecessor State has set up a public establishment which is common to two or more neighbouring countries, but with the headquarters and most of the patrimony or activity situated in the territory which has become independent. A case in point is the Djibouti-Addis Ababa Railway. The patrimony of the colonial Power in the public establishment must be the subject of a plan for apportionment which takes into account the size of the share in the establishment held by each State. The problem can be solved only through treaty provisions stating that the successor State shall grant to third States compensation in proportion to their share, or, better still, providing for economic co-operation between all the States involved.

VI. PROVISIONS CONCERNING TERRITORIAL AUTHORITIES

Article 36. Definition of territorial authorities

Version A:

For the purposes of the present articles, "territorial authority" means any administrative division of the territory of a State.

Version B:

For the purposes of the present articles, "territorial authority" means any administrative division of the territory of a State which is characterized by its own territory, population and administrative authority but does not possess international legal personality.

COMMENTARY

(1) The Special Rapporteur suggests two different versions for the definition of territorial authorities, one being an extension of the other. The first version merely defines them as simple administrative divisions. The second provides a somewhat negative definition: anything which is not a State, although it has a territory, a population and authority, can only be a territorial authority.

(2) International law does not provide a definition of a subject of municipal law. Territorial authorities, municipalities, districts, cantons, *arrondissements*, provinces, regions and even federated States—have legal personality, but only in the internal juridical order of a unitary or federal State. They are not subjects of international law.

(3) The Special Rapporteur could have referred to the municipal law of a State in order to define territorial authorities. However, even if such a definition existed and it was possible and desirable to give a rule of municipal law the force of a rule of international law, such a solution would be unsatisfactory because the nature and role of territorial authorities and the law governing them vary considerably from one State to another.

(4) International lawyers have approached the problem of defining "property of municipalities", and therefore indirectly that of defining municipalities, in the context of the law of war, and particularly of the Hague Conventions of 1907. They have considered the question of the treatment of municipal property in the case of foreign

[278] Article 10 of the Protocol of 24 September 1962 (for reference see above note 274).

[279] See above note 109.

[280] With reference to the apportionment of railway networks in Central Europe and their administrative and technical reorganization, see the case of the Barcs-Pakrac Railway (United Nations, *Reports of International Arbitral Awards*, vol. III (United Nations publication, Sales No. 1949.V.2), p. 1569), the case of the Sopron-Köszeg Railway (*ibid.*, vol. II, United Nations publication, Sales No. 1949.V.1), p. 961; and *Revue générale de droit international public* (Paris), 3rd series, vol. IV, 1930, pp. 324-334), and the case of the Zeltweg-Wolfsberg and Unterdrauburg-Woellan railways (United Nations, *Reports of International Arbitral Awards*, vol. III *(op. cit.)*, p. 1795.

military occupation. However, they differ in their interpretation of the meaning to be attributed to the term "property of municipalities".[281] Some feel that, under the Hague Convention, the same régime was to be applied to the property of municipalities and that of the State.[282] Others considered that the distinction between the property of municipalities and State property is not realistic and proposed criteria for determining the patrimony of the State.[283] Max Huber, faced with the difficulty of defining the patrimony of the State and that of what he calls "independent establishments", proposes two criteria: one of form concerning the legal personality of the holder of the patrimony, and the other of substance covering the purpose for which the patrimony is to be used. If there is any doubt, according to the author, the existence of a legal personality separate from the State must be acknowledged provided that the following three elements are present:

(*a*) A body legally independent of the administrative organs of the State;

(*b*) The capacity to possess rights and property;

(*c*) A different purpose [from that of the State].[284]

(5) Other writers believe that the régime applicable under the Hague Convention to "the property of municipalities"—which allows such property to be assimilated to private property for the purposes of protection—also applies to the property of all other territorial authorities, the deciding factor being that the property concerned meets purely local needs.[285]

These different interpretations, formed in the context of the law of war, do not allow for a precise definition of territorial authorities. Consequently, the Special Rapporteur would prefer one or the other of the two versions he proposes.

Article 37. Public property proper to territorial authorities

Version A

The change of sovereignty shall leave intact the ownership of the patrimonial property, rights and interests proper to territorial authorities.

Version B

The change of sovereignty shall leave intact the owner ship of patrimonial property, rights and interests proper to territorial authorities, which shall be incorporated, in the same manner as the said authorities themselves, in the juridical order of the successor State.

COMMENTARY

(1) In draft article 8 relating to the "General treatment of public property according to ownership", the Special Rapporteur has inserted a subparagraph (*b*) reading thus: "Public property of authorities or bodies other than States shall pass within the juridical order of the successor State".

His commentaries on this article, to which he now refers the reader, allow him to be brief here.

(2) It will be recalled that a resolution adopted by the Institute of International Law in 1952, at its Siena session, stated that local corporate bodies retained the right of ownership over their property after territorial changes.[286] It is also known that the régime of public property belonging to local authorities themselves was the subject, in particular, of a decision by the Franco-Italian Conciliation Commission on 9 October 1953.[287] The Commission had to adjudicate upon the fate of property of the frontier municipalities whose areas had been divided by the new frontier established by the Treaty of Peace with Italy of 10 February 1947.

(3) The agent of the French Government considered that the para-statal property transferred to the successor State under paragraph 1, sub-paragraph 2 of annex XIV to the Treaty included the property of local authorities. In the view of Italy, on the contrary, the paragraph referred not to a real transfer of property but to the property's incorporation in the juridical order of the successor State.

The Commission for its part stated that

> apportionment cannot, as a rule, change the nature of existing rights; it is, however understood that those rights will henceforth, if necessary, be exercised in the context of the French municipal juridical order instead of in the context of the Italian municipal juridical order, and *vice versa*. The property which belonged to Italian municipalities themselves shall normally, if it is allotted to them at the time of the apportionment, be allocated to them in full ownership, even if henceforth the property is situated in French territory; similarly, property in Italian territory allotted to municipalities which were formerly Italian and are now French must remain in the ownership of those municipalities, if it belonged to the municipality itself before the entry into force of the Treaty of Peace.[288]

(4) However, the Commission based its views on the clear wording of the treaty when it decided that

> it is the successor State that shall receive, without payment, not only the State property but also the para-statal property, including municipal property, within the territories ceded. It is the municipal legislation of the successor State that must determine the fate (final destination and juridical régime) of the property thus transferred, in the new State context into which the property has passed following the cession of the territory.[289]

(5) It is true that this is a treaty provision, which stipulates unequivocally that the ownership of the property

[281] See O. Debbasch, *L'Occupation militaire — Pouvoirs reconnus aux forces armées hors de leur territoire national* (Paris, Librairie générale de droit et de jurisprudence, 1962), pp. 29-30.

[282] W. M. Franklin, "Municipal property under belligerent occupation", *American Journal of International Law* (Washington, D.C.), vol. 38, No. 3, July 1944, pp. 304 *et seq.*

[283] M. Huber, "La propriété publique...", *Revue générale... (loc. cit.)*, pp. 680 *et seq.*

[284] *Ibid.*, p. 682.

[285] A. Rolin, *Le droit moderne de guerre* (Brussels, Dewit, 1920), vol. I, pp. 540 *et seq.*

[286] See above, para. 7 of the commentary to article 8.

[287] See above, note 40.

[288] United Nations, *Reports of International Arbitral Awards*, vol. XIII (United Nations publication, Sales No. 64.V.3), pp. 520-521.

[289] *Ibid.*, pp. 514-515.

of *municipalities* shall be transferred to the successor *State*. But the normal solution can only be that in the case of the transfer of territory the territorial authorities retain the right of ownership over their own property, If the successor State *subsequently* modifies the substance of that right, it will do so by an act of public power as a *sovereign State*, not as a successor State. That situation falls outside the scope of the succession of States.

On the other hand, however, succession to the property of local authorities raises the problem of *succession to legislation*, which will be studied by the International Law Commission at a later stage. Such property henceforth is incorporated in a juridical order different from the order to which it formerly belonged. Its juridical régime may therefore remain the same or on the contrary evolve according to the conditions governing the transition from the legislation of the predecessor State to that of the successor State.

(6) One writer has observed that

> the treaties between the Reich and the Protectorate of Bohemia-Moravia, Slovakia and Hungary, all stipulated that the property of local authorities, in so far as the territory of the latter was not divided under the territorial cessions granted by Czechoslovakia, was to remain intact.[290]

However, despite the exception presented by the division of property of local authorities between Romania and Bulgaria,[291] treaty practice also shows that the right of ownership of territorial authorities is left intact.

Article 38. Property of the State in territorial authorities

1. The share of the predecessor State in the property, rights and interests of a territorial authority shall be transferred *ipso jure* to the successor State.

2. Where there are two or more successor States, the said share shall be apportioned between them, with due regard to the viability of the territorial authority, to the geographical location and origin of the property, and subject, where necessary, to equalization payments and offset.

COMMENTARY

(1) Article 38 corresponds to article 34, which concerns property of the State in public establishments. In other words, it puts forward an identical solution to basically similar concerns. The property owned by the predecessor State in a territorial authority or in an enterprise of the authority has the same fate as other public property which constitutes the patrimony of the State and must therefore be transferred to the successor State.

It would seem that this rule is valid for all types of succession of States except the uniting of States. In the latter case, the normal procedure would appear to be the maintenance of the *status quo*, unless a contrary decision is taken by agreement. The Commission must decide whether it should deal with this case separately or redraft the article in order to take it into account.

(2) If there are two or more successor States, the property of the predecessor State in the patrimony of territorial authorities will be apportioned justly and equitably among the successor States. The criteria for apportionment (viability, geographical location, origin of the property, equalization payments and offset) will be defined in greater detail during the consideration of article 39, which covers the problem of territorial authorities divided following transfers of territory.

Article 39. Divided territorial authorities

Where the change of sovereignty has the effect of dividing a territorial authority into two or more parts attached to two or more successor States, the patrimonial 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, to the geographical location and origin of the property, and subject, where necessary, to equalization payments and offset.

COMMENTARY

(1) The Franco-Italian Conciliation Commission based its decision of 9 October 1953 (which has already [292] been mentioned on paragraph 18, of annex XIV to the Treaty of Peace with Italy, which provided that the property of municipalities whose areas were divided should be "equitably apportioned" among those municipalities.[293]

This case concerns the apportionment of municipal property between a predecessor State and a successor State, not among several successor States. However, the solutions remain the same and the suggested article 39 could just as well apply to the case of a change of sovereignty which would have the effect of dividing a territorial authority into two or more parts, one part being retained in the predecessor State, if it still exists, and the other part or parts being attached to one more successor States.

(2) The Conciliation Commission stated that the apportionment of such property must be carried out *within the context of each former municipality*. On the basis of the text of the Treaty of Peace of 1947, it formulated certain principles. Paragraph 18, of annex XIV to the Treaty of Peace provided for apportionment by agreement between the successor States. That apportionment must be just and equitable. *Moreover, it must ensure the maintenance of the municipal services necessary to the inhabitants. It must therefore be carried out according to a principle of utility.* The Commission stressed that the *interest of the population* must be the governing factor

[290] I. Paenson, *op. cit.*, p. 111. Convention of 4 October 1941 between the Third Reich and the Protectorate of Bohemia-Moravia (*Reichsgesetzblatt*, Teil II, Berlin, 24 April 1942, No. 13, p. 195); Agreement of 13 April 1940 between the Third Reich and Slovakia (*ibid.*, 20 August 1941, No. 34, p. 305); Agreement of 21 May 1940 between the Third Reich and Hungary (*ibid.*, 6 June 1941, No. 23, p. 199).

[291] Romania ceded property of local authorities to Bulgaria on the same basis as State property, in the Treaty of Craiova of 7 September 1940.

[292] See above note 40.

[293] United Nations, *Treaty Series*, vol. 49, p. 229.

in the apportionment of the property belonging to the divided municipalities. The Commission was, of course, alluding to *the population of the dismembered municipality*, not the population of the municipality whose area has been expended by the annexation.

(3) The Commission gave a definition of the "municipal services necessary to the inhabitants" referred to in annex XIV, paragraph 18: "... *a set of facilities which by their use, their nature or their location, exert a decisive influence on local life* *". Moreover, in this case of modification of the frontier "... the essential characteristic of a public service in this instance is *the link between possession by the municipality of the property in question and the fulfilment, by means of such possession, of the economic, social or family needs of the inhabitants* *; the type of use is irrelevant; the degree of directness of the link in question is also irrelevant.".[294]

(4) On the basis of this decision by the Franco-Italian Conciliation Commission it can therefore be concluded that the apportionment of the property of territorial authorities whose areas are divided must:

(*a*) Be carried out in a spirit of justice and equity;

(*b*) Take account of the economic, geographical, social and demographic conditions of those territorial authorities, as well as of the nature and location of the property;

(*c*) Safeguard the interest of the public service in the widest sense;

(*d*) If necessary, include compensation in kind or cash, assessed according to the needs of the population. However, in the present case, the Commission did not deem it necessary to establish an apportionment account.

(5) The principle of taking account of conditions of viability was also applied at the time of the division of the canton of Basle into two half cantons, pursuant to a decision by the Federal Diet in 1833. The arbitral tribunal presided over by Professor Keller assessed the administrative and fiscal wealth of the State and apportioned it between the two half cantons with due regard to population density.[295]

(6) Similarly, examples of conventions which always provide for a just and equitable apportionment of the property of territorial authorities whoses areas have been divided are to be found in the book by Paenson already mentioned.

VII. PROPERTY OF FOUNDATIONS

Article 40. Property of foundations

1. 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.

2. Where the predecessor State possessed a share in the patrimony of a foundation, that share shall be transferred to the successor State, or where there are two or more successor States, apportioned equitably between them.

COMMENTARY

(1) The property of religious, charitable, cultural or scientific foundations has been the subject of special provisions in many agreements relating to State succession, as well as of a relatively large number of judicial decisions. Certain principles can therefore be derived from international practice and from judicial practice.

The article suggested above raises three aspects of the question of foundations: (i) respect for private foundations which in principle retain their property without any change; (ii) possible involvement of the concept of public policy, which may lead the successor State to infringe upon respect for the *status quo*; and (iii) transfer to the successor State or States of the property owned by the predecessor State in the patrimony of a foundation.

A. *Patrimonial situation unchanged*

(2) The Austro-Bavarian Convention of 3 June 1814,[296] the Treaty of 20 May 1815 between the King of Sardinia, Austria, England, Russia, Prussia and France,[297] the Treaty of 18 May 1815 between Prussia and Saxony,[298] and the Act of the Congress of Vienna [299] provided that the foundations or communities, corporations and religious or public educational establishments in the provinces and districts ceded should retain their property as well as the income they possessed in accordance with the act of foundation or with acquisitions legally made by them.

Article XV of the Additional Treaty relating to Cracow, signed at Vienna on 21 April-3 May 1815 by Austria, Prussia and Russia read:

> The Cracow Academy is confirmed in its privileges and in the ownership of the buildings and the library appertaining to it, as well as of the amounts it owns in land or in mortgaged capital.[300]

It would be possible to cite in this manner a multitude of diplomatic texts of the same type, showing that territorial changes have had no effect on the situation with regard to the patrimony of foundations.

(3) Property known as "dedicated" in Moslem law,[301] which is withheld from trade and from the process of inheritance, and thus becomes inalienable and imprescriptible on religious grounds, is assigned by its owners

[294] United Nations, *Reports of International Arbitral Awards*, vol. XIII *(op. cit.)*, p. 520.

[295] P. Guggenheim, *op. cit.*, p. 467.

[296] Article IX of the Convention signed at Paris on 3 June 1814 between Austria and Bavaria.G. F. de Martens, ed., *Nouveau Recueil général de traités* (Göttingen, Dieterich, 1887), vol. II (1814-1815) (reprint), p. 18.

[297] Annex to article VII and annex to article IV of the Treaty of 20 May 1815 (*ibid.*, p. 298).

[298] Article XVI of the Treaty of 18 May 1815 (*ibid.*, p. 272).

[299] Article XXI of the Act of the Congress of Vienna of 9 June 1815 (*ibid.*, p. 379).

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

[301] The property known as "*habous*" or "*waqf*" (or the Arabic plural of this word, "*awqâf*", transcribed into French in various forms, in particular as "*vakouf*" in a number of diplomatic texts). See *Yearbook...1970*, vol. II, p. 138, document A/CN.4/226,

(Continued on next page.)

to a religious, social assistance, charitable or other work or purpose of public utility.

Under article XII of the Treaty of Constantinople between Turkey and Bulgaria the problem of such property was settled by maintaining the *status quo*:

> The Mustesna, Mulhaka, Idjaretein, Moukataa and Idjarei-vahide *vakoufs* as well as *vakouf* tithes in the ceded territories, as specified under current Ottoman law, *shall be respected* *.
>
> They shall be managed by duly authorized persons.
>
> The régimes to which they are subject may be modified only if fair prior compensation is paid.
>
> The rights of the religious and benevolent establishments of the Ottoman Empire to *vakouf* income in the ceded territories, derived from idjarei-vahide, moukataa, miscellaneous titles and the equivalent value of *vakouf* and other tithes, on *vakoufs* whether built or not, *shall be respected* *.[302]

(4) When France annexed Nice and Savoy, article 7 of the Franco-Sardinian Convention of 23 August 1860,[303] in principle settled the problem of the property of churches and religious congregations by maintaining the *status quo*. However, difficulties arose, especially after the passage of the French Act of 9 December 1905 separating church and State. Even after the adoption of this Act, however, France retained the system of scholarships and *cartelli*. The church scholarships were provided for poor schoolchildren, and French legislation agreed to continue payment of them.[304] The French Government also continued to pay ecclesiastical stipends, in particular the *cartelli*, which were a perpetual annuity paid regularly by the Sardinian Government to ministers of religion, despite the affirmation of the Act of Separation of 1905 that "the Republic . . . shall not give financial support to any religion".[305]

(5) Similarly, we read in the Convention between the United States and Denmark providing for the cession of the Danish West Indies that "The congregations belonging to the Danish national Church shall retain the undisturbed use of the churches which are now used by them, together with the personages appertaining thereunto and other appurtenances, including the funds allotted to the churches."[306]

(6) The Franco-Indian Agreement of 21 October 1954 concerning the transfer of the French Establishments in India to the Indian Union [307] affords another example. Article IX of the Agreement reads:

> Properties pertaining to worship or in use for cultural purposes shall be in the ownership of the missions or of the institutions entrusted by the French regulations at present in force with the management of those properties.
>
> The Government of India agree to recognise as legal corporate bodies, with all due rights attached to such a qualification, the "Conseils de fabrique" and the administration boards of the Missions.

Article 32 of the same Agreement adds

> . . . Properties which are at present in the possession of the religious authorities shall be retained by them and the Government of India agree, whenever necessary, to convey the titles to them.

(7) The Treaty of Peace with Italy of 10 February 1947, for its part, provided that property belonging to Italian religious bodies or private charitable institutions would be exempt from any confiscation measures.[308]

(8) In the case *Bolshanin et al.* v. *Zlobin et al.*, the District Court of Alaska ruled in favour of the maintenance of the property rights of religious foundations. Members of the Russian Church at Sitka, Alaska, claimed ownership of the church buildings and lands by virtue of the 1867 Treaty by which Russia ceded Alaska to the United States. Article II of this treaty provided that "the churches which have been built in the ceded territory by the Russian Government, shall remain the property of such members of the Greek Oriental Church resident in the territory, as may choose to worship therein". The defendants, the priest and the Metropolitan of the Greco-Russian Church in America referred to a patent granted them by the United States Government in 1914. The Court judged that private titles granted by a former sovereign were not affected by the change in sovereignty that had taken place.[309]

(9) In the Peter Pázmány University case, adjudicated by the P.C.I.J., the same principles of respect for the property of foundations were applied.[310] Article 250 of the Treaty of Trianon followed the same direction, providing that " . . . the property, rights and interests of Hungarian nationals or companies controlled by them

(Foot-note 301 continued)

part two, commentary to article 1 and notes 22 and 23. This type of property was discussed a great deal following the various dismemberments of the Ottoman Empire, the mandates and Capitulations in the Middle East, and the colonization or establishment of protectorates in North Africa with regard to France or Italy.

[302] G. F. de Martens, ed. *Nouveau Recueil général de traités* (Leipzig, Weicher, 1915), 3rd series, vol. VIII, p. 78. Article VIII of annex 2 to the same treaty gives more details on the management of such property by the Moslem community, on cemeteries and mosques and on expropriation procedures in cases of overriding necessity and in the event of demolition. See also article XII of the Greco-Turkish Convention signed on 1-14 November 1913, which respects the *vakouf* property of certain "tekkes, mosques, madrasahs, schools, hospitals, and other religious or benevolent institutions", but applies various restrictions (*ibid.*, pp. 97-98).

[303] G. F. de Martens, ed., *Nouveau Recueil général de traités* (Göttingen, Dieterich, 1869), vol. XVII, part II, p. 22.

[304] Cf. Ch. Rousseau (*op. cit.*, p. 169), who quotes the concordant rulings of the Court of Cassation (22 July 1914) and the Council of State (France, Conseil d'Etat, 19 July 1916, "Bourse des pauvres écoliers d'Annecy", *Recueil des arrêts du Conseil d'Etat* (Paris, 1916), p. 188).

[305] France, *Bulletin des lois de la République française* (Paris, 1905), XIIth series, vol. 71, No. 2663, p. 1697. See also Ch. Rousseau, *op. cit.*, p. 169.

[306] End of article 2 of the Convention of 4 August 1916 (for reference, see above, note 81).

[307] For reference, see above, note 115.

[308] Article 79, paragraph 6 (*b*) of the Treaty.

[309] Case of *Bolshanin et al.* v. *Zlobin et al.*, United States District Court of Alaska, 27 May 1948 (*American Journal of International Law*, 1948 (Washington, D.C.), vol. 42, No. 3 (July 1948), p. 735, quoted in *Yearbook...1963*, vol. II, p. 124, document A/CN.4/157, paras. 255-257.

[310] Judgement of 15 December 1933, "Appeal from a judgement of the Hungaro-Czechoslovak Mixed Arbitral Tribunal (The Peter Pázmány University *v.* the State of Czechoslovakia), in *P.C.I.J.*, Series A/B, No. 61, pp. 208-262. See *Yearbook...1970*, vol. II, p. 140, document A/CN.4/226, part two, paras. 27-30 of the commentary to article 1.

situated in territories which formed part of the former Austro-Hungarian Monarchy shall not be subject to retention or liquidation . . . ".[311]

The Hungaro-Czechoslovak Mixed Arbitral Tribunal, in a judgement rendered on 3 February 1933, had stated that under the terms of article 250, quoted above, the Czechoslovak State should restore certain immovable property to the Peter Pázmány University at Budapest. Czechoslovakia appealed unsuccessfully to the P.C.I.J., which confirmed the first judgement.

The property in question had been donated to the University in 1775 by Queen Maria-Theresa so that it might "own, have and hold it as a perpetual endowment and foundation".[312] The donation was confirmed when the University was transferred to Buda and then to Pest in 1804, and was converted into a title of ownership. Another piece of land, the subject of the litigation, had been purchased by the University in 1914. In 1918, Czechoslovak troops invaded northern Hungary, and the University property situated in Slovakia was seized by the Czechoslovak State. It was placed under the administration of the Central Commission for the Property of the Roman Catholic Church in Slovakia. The University then appealed to the Hungaro-Czechoslovak Mixed Arbitral Tribunal for restoration of its property. The Tribunal, confirmed in its judgement by the Permanent Court of International Justice, upheld the University's claim.[313]

(10) A case adjudicated by the Paris Appeals Court, concerning the "Waqf Abou Médiène" foundation, relates to the problem of what should become of the property of religious foundations. The Court ruled that

> the commitment entered into by the French State with an Israeli lawyer to protect a Moslem private foundation established for Moslem pilgrims from the Maghreb was contracted neither in the name of Algeria nor in the name of an Algerian public establishment, and is therefore not transferred to the Algerian State by article 18 of the Franco-Algerian Declaration of Principles concerning Economic and Financial Co-operation of 19 March 1962.[314]

The Court based its reasoning on the fact that, on the one hand, the foundation concerned was not Algerian but multinational, and on the other hand that what was involved was not a public establishment reverting to Algeria but a non-transferable private fund.

B. *Exceptions to the principle*

(11) The final decision of the Special Commission of the German Empire dated 25 February 1803, concerning the settlement of compensation established under the peace of Lunéville provided, in paragraphs 35 and 37, that the property of certain chapters, abbeys and convents should be placed "*at the free and complete disposal of the territorial princes concerned* * for expenses connected with worship, instruction and other facilities for the public use and also to ease their finances . . . " and that "the property and income belonging to hospitals, church councils, universities, colleges and other religious foundations . . . *shall be placed at the disposal of the rulers concerned* *".[315]

But this is almost certainly explained by the survival, here and there, of mediaeval or feudal law which provided for the free disposal of ecclesiastical property in Europe.

(12) The problem of the property belonging to the churches of Savoy after the annexation of this formerly Sardinian province by France in 1860 was dealt with in a decision by the *Conseil d'Etat* in which this high administrative court of France rejected the principle of non-retroactivity of the law and made the churches of Savoy subject to the same juridical régime as the other churches of France.[316] These churches belonged to the municipalities, which thus acquired the churches of Savoy and their appurtenances which, according to Sardinian law, belonged to the church councils and parochial benefices and normally could be transferred to the municipalities only by expropriation for public purposes.[317] Subsequently the "ecclesiastical corporations" (chapters, canonries, establishments for public worship, lay chaplaincies and hospital institutions) were either abolished or prevented from enjoying the property status they had had prior to the annexation of Savoy.[318]

(13) But the most celebrated case was the case of the hospitals of the English-speaking Protestant missions in Madagascar.[319] The case known as the Soavinandriana hospital case raised the question of general appropriation

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[311] *British and Foreign State Papers, 1920*, vol. 113 *(op. cit.)*, p. 607.

[312] *P.C.I.J.*, Series A/B, No. 61, p. 223.

[313] Czechoslovakia had unsuccessfully invoked the provisions of the sixth paragraph of article 249 of the Treaty of Trianon, whereby "Legacies, donations and funds given or established in the former Kingdom of Hungary for the benefit of nationals of that Kingdom shall be placed by Hungary, so far as the funds in question are in her territory, at the disposal of the Allied or Associated Power of which the persons in question are now, or become, under the provisions of the present Treaty... nationals" (*British and Foreign State Papers, 1920*, vol. 113 *(op. cit.)*, p. 607). Czechoslovakia also unsuccessfully invoked before the Court the Paris Protocol of 26 April 1930 (G. F. de Martens, ed., *Nouveau Recueil général de traités* (Leipzig, Buske, 1934), 3rd Series, vol. XXIX, p. 356), which specified that "Each of the two contracting States shall retain the legacies, donations and foundations of every kind existing in its territory". The Court could not have decided otherwise, since the Protocol stated that it should "in no way affect the case which has been brought by the University of Budapest before the Hungaro-Czechoslovak Mixed Arbitral Tribunal".

[314] Paris Appeals Court, Judgement of 19 February 1968, *Journal du droit international* (Paris), 95th year, No. 2, April-June 1968, p. 336.

[315] G. F. de Martens, ed., *Recueil des principaux traités*, 2nd ed., revised and augmented (Göttingen, Dieterich, 1831), vol. VII, p. 499.

[316] Decision of the *Conseil d'Etat* dated 24 December 1896 (France, *Journal officiel de la République française*, 29 January 1897).

[317] See F. Grivaz, "La question des églises de Savoie et la théorie des droits acquis, *Revue générale de droit international public* (Paris), vol. IV (1897), pp. 645-680. See also Louis Trotabas, *Le droit public dans l'annexation et le respect des droits acquis* (thesis), Paris, 1921, pp. 87-147.

[318] See Ch. Rousseau, *op. cit.*, p. 168 and references to the opinions and judgements of the *Conseil d'Etat*.

[319] See *Yearbook...1970*, vol. II, pp. 137-138, document A/CN.4/226, part two, paragraph 18 of the commentary to article 1. The bibliographical references given should be supplemented by the addition of D. Bardonnet's well documented work, published later and entitled *La succession d'Etats à Madagascar... (op. cit.)*, *passim*, and particularly pp. 178-205.

of religious edifices by the successor State. The hospital had been built by British missionaries on the basis of a deed of concession by Queen Ranavalo, who was entitled to retain ownership of the entire property on the date of cessation of the hospital's activities. When the French protectorate was replaced by annexation in 1896, the concession was terminated by General Gallieni, who requisitioned the hospital. The British Law Officers of the Crown gave two opinions, on 22 March 1897 and 2 February 1898, criticizing the French position, which remained unchanged. The two Parliaments, the two Governments and the English and Franco-Malagasy courts hotly debated the issue, which culminated in the award of a very meagre amount of compensation to the dispossessed missions.

(14) The status of the "*habous* property" and the property of various religious foundations in Algeria was not respected by the successor State in 1830.[320] Similar property was treated in the same way when Libya was annexed by Italy. The Libyan religious foundations recovered their property in 1950 and the buildings used in connexion with non-Moslem public worship were transferred by Italy to the respective religious communities.

(15) Similarly, the various treaties of cession of Ottoman Empire territory, particularly to Bulgaria and Greece in the nineteenth or early twentieth century did not alway respect the nature of the *habous* property or *awqâf* as understood by the municipal law of the ceding State.[321] Thus the Protocol between Greece and Turkey signed at the Conference held in London on 16 June 1830 [322] abolished the *awqâf* without compensation in the territories occupied by the Greek army and transferred to Greece the property of the State and Moslem foundations in the other territories which were to pass to Greece. Only the privately-owned *awqâf* were respected.[323]

C. *Property of the State in foundations*

(16) There are semi-public foundations of which the State owns a share of the capital. These are usually cultural or scientific foundations or schools and institutes. According to paragraph 2 of article 40, the share of the predecessor State is transferred to the successor State or States. There have been cases, however, in which the predecessor State kept a share of the property of these foundations. For example when Indo-China became independent, the property belonging to the Ecole française d'Extrême-Orient became inalienable common property of the three associated States and France. The same was true of the property belonging to the Pasteur Institute in Indo-China.

(17) Mention may be made in passing—although this has nothing to do with property of the State in foundations—of two cases where the predecessor State kept the assets of such foundations either temporarily or permanently. The violent conditions in which Israel was established led the United Kingdom, which was the mandatory Power in Palestine, to take such measures. Consequently, the Rockefeller Endowment Found, intended for the Archaeological Museum of Palestine, remained in the possession of the United Kingdom Government pending a decision by the Foreign Office.[324]

An agreement between Jordan and the United Kingdom also allowed half of the assets of a foundation to be unblocked for the benefit of Jordan after several years.[325] Article 7 of this Agreement provided that

> The Government of the United Kingdom shall, within the terms of the bequest of the late Sir Ellis Khadoorie, make available to the Government of Jordan one-half of the balance of that bequest, which balance amounts to £86,237, and one-half of the accrued interest on the said balance, to be used for the purposes of the Khadoorie Agricultural School in Jordan.[326]

D. *The property of the Moslem Institute and of the Mosque in Paris*

(18) As a sequel to these developments, it may be useful to provide some information concerning the case of the foundation known as the "Society of the *Habous* and Holy Places of Islam", which was established at Algiers before Algeria became independent and had built and administered a Moslem Institute and Mosque in Paris. This is a case of property belonging to a religious foundation and situated outside the territory affected by the change of sovereignty.

(19) The "Society of the *Habous* and Holy Places of Islam" was established at Algiers on 16 February 1917 by a deed deposited with the hanifite *cadi* of Algiers. The Society, whose headquarters were situated in the Great Mosque at Algiers, had decided to purchase two buildings at Mecca and Medina for the benefit of needy North and West African pilgrims.

On 24 December 1921 the Society was converted into an association under French law subject to the French Act of 1901 on associations, and registered as such with the Prefecture of Algiers. The Society then decided to build and establish a Mosque and a Moslem Institute in Paris and, for that purpose, received a sum of 500,000 francs from the French Government, a grant from the Municipal Council of Paris for the purchase

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[320] See *Yearbook...1970*, vol. II, p. 138, document A/CN.4/226, part two, paragraph 19 of the commentary to article 1.

[321] See M. Costes, *Des cessions de territoires envisagées dans leur principe et dans leurs effets relatifs au changement de souveraineté et de nationalité* (thesis) (Paris, Rivière, 1914), pp. 77-91.

[322] *British and Foreign State Papers, 1830-1831* (London, Ridgway, 1830), vol. 18, p. 600.

[323] See also the Greek-Turkish Convention of 2 July 1881 concerning the final demarcation of the frontiers between the two countries (G. F. de Martens, ed., *Nouveau Recueil général de traités* (Göttingen, Dieterich, 1883), 2nd series, vol. VIII, p. 2) which left the successor State free to determine, in accordance with its laws and the requirements of public policy, the regulations governing the few remaining *awqâf*, the others having been abolished.

[324] Cf. I. Paenson, *op. cit.*, p. 74.

[325] Agreement between the Government of the United Kingdom of Great Britain and Northern Irland and the Governement of the Hashemite Kingdom of Jordan for the settlement of financial matters outstanding as a result of the termination of the mandate for Palestine, signed at Amman on 1 May 1951 (United Nations, *Treaty Series*, vol. 117, p. 19).

[326] According to an agreement of 13 March 1950 between the United Kingdom and Israel, the other half of the Khadoorie bequest was handed over to Israel.

of land and, from Algeria, Morocco, Tunisia and other African countries annual subsidies of which that from Algeria was by far the most regularly paid.

(20) After the establishment of the Mosque and the Moslem Institute, an Algerian was always appointed by the Administrative Board of the Society to represent it in Paris. and to be in charge of the administration of the two Parisian institutions. But during the Algerian war, Mr. Guy Mollet, the Prime Minister, replaced the Administrative Board of the Society and, by a decree of 18 May 1957, appointed an Algerian—in the purely ethnic sense of the word—as director of the Mosque and the Institute. On 16 January 1958, this director had the Society's statutes revised, thus annulling the constituent act of the foundation and, two weeks before the cease-fire in Algeria, had the Society's headquarters transferred from Algiers to Paris on 2 March 1962.

(21) On 13 February 1963 the Administrative Tribunal of Paris, on the grounds of irregularity, annulled Mr. Guy Mollet's decision concerning the appointment of the director of the Mosque and the Institute. The Conseil d'Etat, by a decision dated 8 November 1963,[327] confirmed the unlawful nature of the Prime Minister's action. However the director continued to head the two religious institutions, availing himself of a decision allegedly adopted by a "general meeting" of the Society after he had amended the Society's statutes.

[327] France, Conseil d'Etat, *Recueil des décisions du Conseil d'Etat* (Paris), November-December 1963, para. 378.

(22) Immediately after Algeria acquired independence, the French Government, to which the matter had been referred by the Algerian authorities, informed those authorities that, in its opinion, the Society could no longer claim to have a legal existence and that its property, having escheated, should be subject to *jus soli*. The Algerian Government, on the other hand, contended that the Society still existed at Algiers and that its rights in respect of the Mosque and the Institute had not been extinguished.

The French Government then proposed, in 1963, that the property of the Society, which in its opinion was defunct, should be handed over to a new association to be established at Algiers with Moroccan and Tunisian participation.

(23) Subsequently the Seine Court of First Instance, by a decision handed down on 24 May 1967, ruled that (*a*) the Society was a foreign one and that, according to article 21 of the 1901 Act on associations, its headquarters were still at Algiers, and (*b*) that the Society had not acquired, from the Algerian Government, the capacity to be a party to legal proceedings.

(24) Consultations are still in progress between the French Government on the one hand, and the Algerian, Tunisian and Moroccan Governments on the other hand, with a view to settling the matter definitively by relieving the present director of his duties, since he was appointed under a decree considered to be irregular, and handing over the property of the two Parisian institutions to the Maghrebian authorities.