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Eighth report on succession of States in respect of matters other than treaties, by Mr. Mohammed Bedjaoui, Special Rapporteur - draft articles on succession to State property, with commentaries (continued)

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

Draft articles on succession to State property with commentaries *(continued)*

[*Original: French*]
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CONTENTS

ABBREVIATIONS

I.C.J. Reports	I.C.J., *Reports of Judgments, Advisory Opinions and Orders*
IMF	International Monetary Fund

EXPLANATORY NOTE: ITALICS IN QUOTATIONS

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

CHAPTER I

Draft Articles on succession of States in respect of matters other than treaties

NOTE: The articles whose numbers are followed by the symbol[(a)] were adopted by the International Law Commission at previous sessions.

INTRODUCTION

Article 1.[(a)] 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.[(a)] 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.[(a)] Use of terms

For the purposes of the present articles:

(*a*) "succession of States" means the replacement of one State by another in the responsibility for the international relations of territory;

(*b*) "predecessor State" means the State which has been replaced by another State on the occurrence of a succession of States;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

(*d*) "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;

(*e*) "third State" means any State other than the predecessor State or successor State.

PART I

SUCCESSION TO STATE PROPERTY

SECTION 1. GENERAL PROVISIONS

Article 4.[(a)] Scope of the articles in the present Part

The articles in the present Part apply to the effects of succession of States in respect of State property.

Article 5.[(a)] State property

For the purposes of the articles in the present Part, "State property" means property, rights and interests which, on the date of the succession of States, were, according to the internal law of the predecessor State, owned by that State.

Article 6.[(a)] Rights of the successor State to State property passing to it

A succession of States entails the extinction of the rights of the predecessor State and the arising of the rights of the successor State to such of the State property as passes to the successor State in accordance with the provisions of the present articles.

Article 7.[(a)] Date of the passing of State property

Unless otherwise agreed or decided, the date of the passing of State property is that of the succession of States.

Article 8.[(a)] Passing of State property without compensation

Without prejudice to the rights of third parties, the passing of State property from the predecessor State to the successor State in accordance

with the provisions of the present articles shall take place without compensation unless otherwise agreed or decided.

Article 9.[a] General principle of the passing of State property

Subject to the provisions of the articles of the present Part and unless otherwise agreed or decided, State property which, on the date of the succession of States, is situated in the territory to which the succession of States relates shall pass to the successor State.

[*Article 11.[a] Passing of debts owed to the State*

Subject to the provisions of the articles of the present Part and unless otherwise agreed or decided, debts owed (*créances dues*) to the predecessor State by virtue of its sovereignty over, or its activity in, the territory to which the succession of States relates shall pass to the successor State.][1]

Article X.[a] Absence of effect of a succession of States on third State property

A succession of States shall not as such affect property, rights and interests which, on the date of the succession of States, are situated in the territory [of the predecessor State or] of the successor State and which, at that date, are owned by a third State according to the internal law of the predecessor State [or the successor State as the case may be].

* * *

SECTION 2. PROVISONS RELATING TO EACH TYPE OF SUCCESSION OF STATES

SUB-SECTION 1. SUCCESSION IN RESPECT OF PART OF TERRITORY

Article 12. Succession in respect of part of territory as regards State property situated in the territory concerned

When territory under the sovereignty or administration of a State becomes part of another State:[2]

(*a*) the ownership of immovable property of the predecessor State situated in the territory to which the succession of States relates shall, unless otherwise agreed or decided, pass to the successor State;

(*b*) the ownership of movable property of the predecessor State which, on the date of the succession of States, is situated in the territory to which the succession of States relates shall also pass to the successor State:

(i) if the two States so agree, or

(ii) if there exists a direct and necessary link between the property and the territory to which the succession of States relates.

Article 13. Succession in respect of part of territory as regards State property situated outside the territory concerned

When territory under the sovereignty or administration of a State becomes part of another State,[3] [movable or immovable] property of the predecessor State situated outside the territory to which the succession of States relates shall, unless otherwise agreed or decided:

(*a*) remain the property of the predecessor State;

(*b*) pass to the successor State if it is established that the property in question has a direct and necessary link with the territory to which the succession of States relates; or

(*c*) be apportioned equitably between the predecessor State and the successor State if it is established that the territory to which the succession of States relates contributed to the creation of such property.

Article 14. Succession to State property situated in newly independent States

1. Unless otherwise agreed or decided, the newly independent State shall exercise a right of ownership of immovable property which, in the territory which has become independent, was owned on the date of the succession of States by the predecessor State.

2. Movable property of the predecessor State situated, on the date of the succession of States, in the territory which has become independent shall pass to the successor State unless:

(*a*) the two States otherwise agree;

(*b*) such property has no direct and necessary link with the territory, and the predecessor State has claimed ownership thereof within a reasonable period.

3. Nothing in the foregoing provisions shall affect the permanent sovereignty of the newly independent State over its wealth, its natural resources and its economic activities.

Article 15. Succession to State property situated outside the territory of the newly independent State

Property of the predecessor State which is situated outside the territory of the newly independent State shall remain the property of the predecessor State, unless:

(*a*) the two States otherwise agree; or

(*b*) it is established that the territory which has become independent contributed to the creation of such property, in which case it shall succeed thereto in the proportion determined by its contribution; or

(*c*) in the case of movable property, it is established that its being situated outside the territory of the newly independent State is fortuitous or temporary and that it has in fact a direct and necessary link with that territory.

Article 16. Uniting of States

1. On the uniting of two or more States in one State, movable and immovable property situated in the territory of the State thus formed shall remain the property of each constituent State unless:

(*a*) the constituent States have otherwise agreed; or

(*b*) the uniting of States has given rise to a unitary State; or

(*c*) in the case of a union, the property in question has a direct and necessary link with the powers devolving upon the union and it thus appears from the constituent acts or instruments of the union or is otherwise established that retention by each constituent State of the right of ownership of such property would be incompatible with the creation of the union.

2. Movable and immovable property situated outside the territory of the State formed by the uniting of two or more States and belonging to the constituent States shall, unless otherwise agreed or decided, become the property of the successor State.

Article 17. Succession to State property in cases of separation of parts of a State

When a part or parts of the territory of a State separate to form one or more States, whether or not the predecessor State continues to exist:

1. its immovable property shall, except where otherwise specified in treaty provisions, be attributed to the State in whose territory the property is situated;

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[1] See below, foot-note 8.

[2] *Variant:* "When part of the territory of a State, or when any territory, not being part of the territory of a State, for the international relations of which that State is responsible, becomes part of the territory of another State . . .".

[3] *Variant:* "When part of the territory of a State, or when any territory, not being part of the territory of a State, for the international relations of which that State is responsible, becomes part of the territory of another State . . .".

2. its movable property shall:

(*a*) be attributed to the State with whose territory it has a direct and necessary link, or

(*b*) be apportioned in accordance with the principle of equity among successor States so formed, or among them and the predecessor State if it continues to exist;

3. Movable and immovable property of the predecessor State situated outside the territory of that State shall be apportioned equitably among the successor States and the predecessor State if the latter continues to exist, or otherwise among the successor States only.

CHAPTER II

Introduction to the eighth report

A. Methodological choices

1. The first question which arises in connexion with the present report is one of methodology. In studying succession of States in respect of State property, there are a number of possible approaches, based on the consideration of a number of "reference keys" and perhaps on a combination of them. One can approach the question from the standpoint of the *type of succession* and formulate draft articles containing rules appropriate to each type. It is also possible to consider the specific *nature of the property* in question (currency, archives, Treasury and public funds, etc.) and devote a special rule to each of these types of property. Again, a distinction might be made on the basis of the *category of property* under consideration, such as movable property and immovable property, which would be covered by separate draft articles. Finally, State property can be considered in terms of *where it is situated* and be given different treatment, according as the property is situated in the territory to which the succession of States relates or outside it. By combining these various "keys" it is possible to arrive at quite an extensive range of possible approaches.

2. It will be recalled that, in the five reports which he devoted to succession to public property,[4] the Special Rapporteur tried successively a number of approaches. In the first three of those reports—the third, fourth and fifth—he attempted to formulate rules in general terms so that they could be applied to any type of State succession. Thus, general articles applicable to all types of property and all types of succession were drafted. They were supplemented by a number of special articles relating to individual types of property, such as currency, Treasury and State funds or archives. In the other two reports—the sixth and seventh—the Special Rapporteur introduced distinctions between types of State succession. Thus, special provisions for each of these types were drafted, being further subdivided, first, according as the property in question is or is not situated in the territory to which the succession of States relates, and, secondly, to cover specific types of property such as currency, archives, and so on. In this way, both the vertical and the horizontal divisions established in respect of State property were utilized and combined.

3. In the present document, the Special Rapporteur now refers to three "reference keys", which he combines. They are (*a*) *type of succession,* (*b*) the distinction between *movable property* and *immovable property* and (*c*) the distinction between *property situated in the territory concerned* and *property situated outside that territory.* In the new formulation of his articles, the Special Rapporteur no longer refers to individual types of property considered *in concreto,* such as currency, archives, State funds, and so on. As a result, he has this time avoided involving the International Law Commission in excessive financial or economic technicalities. For a better appreciation of this new approach, however, it is worth while to review and appraise past efforts and achievements.

4. The present report again concerns succession of States in respect of State property. It will be recalled that, in view of the complexity of the subject, the International Law Commission, at its twenty-fifth session, in 1973, endorsed the Special Rapporteur's proposal to limit its study for the time being to just one of the three categories of *public property* dealt with by the Special Rapporteur, namely, *property of the State.*[5]

5. At its twenty-fifth session the Commission adopted eight draft articles, worded as follows:

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 State by another in the responsibility for the international relations of territory;

(*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;

[4] *Yearbook ... 1970,* vol. II, p. 131, document A/CN.4/226 (third report); *Yearbook ... 1971,* vol. II (Part One), p. 157, document A/CN.4/247 and Add.1 (fourth report); *Yearbook ... 1972,* vol. II, p. 61, document A/CN.4/259 (fifth report); *Yearbook ... 1973,* vol. II, p. 3, document A/CN.3/267 (sixth report); *Yearbook ... 1974,* vol. II (Part One), p. 91, document A/CN.4/282 (seventh report).

[5] *Yearbook ... 1973,* vol. II, p. 202, document A/9010/Rev.1, para. 87.

(*d*) "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.

Article 4. Scope of the articles in the present Part

The articles in the present Part apply to the effects of succession of States in respect of State property.

Article 5. State property

For the purposes of the articles in the present Part, "State property" means property, rights and interests which, on the date of the succession of States, were, according to the internal law of the predecessor State, owned by that State.

Article 6. Rights of the successor State to State property passing to it

A succession of States entails the extinction of the rights of the predecessor State and the arising of the rights of the successor State to such of the State property as passes to the successor State in accordance with the provisions of the present articles.

Article 7. Date of the passing of State property

Unless otherwise agreed or decided, the date of the passing of State property is that of the succession of States.

Article 8. Passing of State property without compensation

Without prejudice to the rights of third parties, the passing of State property from the predecessor State to the successor State in accordance with the provisions of the present articles shall take place without compensation unless otherwise agreed or decided.

6. In 1974, at the Commission's twenty-sixth session, the Special Rapporteur submitted a seventh report, dealing exclusively with succession of States in respect of State property. The Commission was unable to consider the draft at that session, owing to lack of time. In its resolution 3315 (XXIX) of 14 December 1974, the General Assembly recommended that the Commission should "Proceed with the preparation, *on a priority basis*,* of draft articles on succession of States in respect of matters other than treaties".

7. In 1975, during its twenty-seventh session, the International Law Commission considered draft articles 9 to 15 and X, Y and Z contained in the Special Rapporteur's seventh report.[6] At that session it adopted the following articles, worded as indicated:

Article 9. General principle of the passing of State property

Subject to the provisions of the articles of the present Part and unless otherwise agreed or decided, State property which, on the date of the succession of States, is situated in the territory to which the succession of States relates shall pass to the successor State.

Article 11.*[7,8] *Passing of debts owed to the State

Subject to the provisions of the articles of the present Part and unless otherwise agreed or decided, debts owed (*créances dues*) to the predecessor State by virtue of its sovereignty over, or its activity in, the territory to which the succession of States relates shall pass to the successor State.[

***Article 3, subparagraph* (e) (*Use of terms*)**

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(*e*) "third State" means any State other than the predecessor State or successor State.

Article X. Absence of effect of a succession of States on third State property

A succession of States shall not as such affect property, rights and interests which, on the date of the succession of States, are situated in the territory [of the predecessor State or] of the successor State and which, at that date, are owned by a third State according to the internal law of the predecessor State [or the successor State as the case may be].

8. At the twenty-seventh session the International Law Commission also began its consideration of section 2 of the draft articles proposed in the seventh report of the Special Rapporteur (Provisions relating to each type of succession of States). It took up articles 12 to 15, as drafted by the Special Rapporteur, on the questions of currency, Treasury and State funds, State archives and libraries, and State property situated outside the transferred territory in the case of the first type of succession of States, namely, that relating to "transfer of part of a territory". A general discussion followed. Before drawing any conclusions from the discussion, however, the Special Rapporteur wishes to return to the question of *types of succession* in order to settle the matter definitely for the purposes of the draft articles under consideration and to avoid further discussion of the kind which occurred over the concept of "transfer of part of a territory" or "succession in respect of part of territory".

B. Choice of types of succession

9. For the topic of succession of States in respect of treaties, the International Law Commission, in its 1972 draft,[9] adopted four separate types of succession of States: (*a*) transfer of part of a territory; (*b*) newly independent States; (*c*) uniting of States and dissolution of unions; (*d*) secession or separation of one or more parts of one or more States.

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[6] See *Yearbook ... 1975*, vol. I, pp. 72 et seq., 1318th to 1329th meetings.

[7] The Commission reserved its position on draft article 10, relating to rights in respect of the authority to grant concessions, because, as stated in its report, it considered it "unnecessary that the draft articles should affirm the principle of the sovereignty of the successor State over its natural resources, since that principle derives from statehood itself and not from the law of succession of States" (*Yearbook ... 1975*, vol. II, p. 108, document A/10010/Rev.1, para. 66).

[8] The Commission decided to place this article between square brackets for the time being, because of some reservations expressed by certain of its members (*ibid.*, pp. 113–114, document A/10010/Rev.1, chap. III, sect. B, art. 11, paras. (10) and (11) of the commentary).

[9] *Yearbook ... 1972*, vol. II, pp. 230 *et seq.*, document A/8710/Rev. 1, chap. II, sect. C.

At its twenty-sixth session, in 1974, the Commission, which had before it for second reading the draft articles on succession of States in respect of treaties, made certain changes which had the effect of defining the first type of succession more fully and clearly and combining the last two types into one.

10. First of all, "transfer of part of a territory" was referred to more accurately as "succession in respect of part of territory". The Commission added to and incorporated into this type of succession the case in which "any territory, not being part of the territory of a State, for the international relations of which that State is responsible, becomes part of the territory of another State".[10] The Commission meant this somewhat hermetic formula to cover the case of a Non-Self-Governing Territory which achieves its decolonization by integration with a State other than the colonial State. Any such case is now assimilated to the first type of succession, namely, "succession in respect of part of territory".[11] In addition, the Commission combined the last two types of succession of States under one heading, "uniting and separation of States".

11. In considering the question of succession of States in respect of treaties, the International Law Commission summarized its choice of types of succession as follows:

> The topic of succession of States in respect of treaties has traditionally been expounded in terms of the effect upon the treaties of the predecessor State of various categories of events, notably: annexation of territory of the predecessor State by another State; voluntary cession of territory to another State; birth of one or more new States as a result of the separation of parts of the territory of a State; formation of a union of States; entry into the protection of another State and termination of such protection; enlargement or loss of territory. In addition to studying the traditional categories of succession of States, the Commission took into account the treatment of dependent territories in the Charter of the United Nations. It concluded that for the purpose of codifying the modern law of succession of States in respect of treaties it would be sufficient to arrange the cases of succession of States under three broad categories: (*a*) succession in respect of part of territory; (*b*) newly independent States; (*c*) uniting and separation of States.[12]

12. All these changes which the Commission made on second reading in the draft articles on succession in respect of treaties could not, of course, be taken into account by the Special Rapporteur in his draft articles on succession of States in respect of matters other than treaties, which had been prepared prior to the 1974 changes.

13. The Special Rapporteur decided that in the present report, with a view to harmonizing the two sets of draft articles, he would follow the Commission's lead by adopting, for these articles also, three types of succession with the same wording, namely:

(*a*) Succession in respect of part of territory;

(*b*) Newly independent States;

(*c*) Uniting and separation of States.

C. Criteria of linkage of the property to the territory

14. Succession to State property is governed, irrespective of the type of succession, by two key criteria which the Special Rapporteur has tried to emphasize throughout his work. While it is entirely proper for all manuals and treaties on international law to note the existence of a general principle that State property passes from the predecessor State to the successor State, the need for certain nuances quite quickly becomes apparent. The essential principle that State property passes to the successor State is simply a reflection of the *principle of the linkage of such property to the territory*. It is through the application of a material criterion, namely, the relation which exists between the territory and the property by reason of the origin or nature of the property or where it is situated, that the existence of the principle of succession to State property can be deduced. Moreover, behind this principle lies the further principle of the actual viability of the territory to which the succession of States relates. In more complicated situations, however, a quite natural combination of another criterion with the one mentioned above is clearly called for if a stalemate is to be avoided. This is the principle of equity, which in such cases enjoins apportionment of the property between the successor State and the predecessor State, or among the successor States if there is more than one.

15. If the predecessor State has effected the *allocation* of the property in question to the territory to which the succession of States relates, or if such property *belongs* to the territory or at least was purchased with the territory's funds (the problem of *origin of the funds*), or if by its nature the property *relates* to the territory, then there is a direct *linkage* between the property and the territory, and this relationship constitutes a ground for the passing of the property to the successor State, at least when such property is situated *in* the territory to which the succession of States relates. When it is situated in the part of the territory remaining under the responsibility of the predecessor State or in the territory of a third State, the difficult problems which arise can be solved only by recourse to the principle of equity and of *apportionment* of the property.

D. Dangers of a study relating to property regarded *in concreto*

16. The debate at the twenty-seventh session of the Commission on draft articles 12 to 15, relating to "succession in respect of part of territory" and covering the problems of

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[10] *Yearbook ... 1974*, vol. II (Part One), p. 208, document A/9610/Rev. 1, chap. II, sect. D, art. 14.

[11] To be perfectly logical, this case should not really be so assimilated; for where is the *"part"* of territory affected by the succession? (1) It is not "part" of the territory of the predecessor State. The 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) prohibits treating a Non-Self-Governing Territory as "part" of the territory of the administering Power. (2) Nor is it "part" of the successor State—at least not yet, until the succession occurs. Furthermore, succession of States is being considered as a phenomenon affecting the territory of the successor State. (3) Finally, the succession obviously relates not merely to "part" of the Non-Self-Governing Territory, but to the whole of it.

Regarding the problems involved in defining types of succession of States, see *Yearbook ... 1973*, vol. II, pp. 29 *et seq.*, document A/CN.4/267, paras. 20–51, and *Yearbook ... 1974*, vol. II (Part One), p. 102, documentary A/CN.4/282, paras. 13–16.

[12] *Yearbook ... 1974*, vol. II (Part One), p. 172, document A/9610/Rev. 1, para. 71.

currency, Treasury and State funds, archives, and property situated outside the territory to which the succession of States refers,[13] brought to light certain doubts which the Special Rapporteur would now like to put into stronger terms and to summarize more usefully as follows:

(*a*) In the case of succession in respect of part of territory, problems of currency, Treasury and State funds, archives and the like do not usually arise. *This is therefore an artificial choice*, since it bears no relation to reality.

(*b*) In the case of other types of succession, the problems of currency, Treasury and State funds, archives and the like codified in the draft articles submitted by the Special Rapporteur are not the only ones which arise. *This is therefore an arbitrary choice*, since it does not cover all possible categories of State property.

(*c*) In any event—i.e., even if the choice is neither artificial nor arbitrary—the approach chosen by the Special Rapporteur exposes the Commission to having to formulate a set of highly technical draft articles on problems, such as currency and Treasury or State funds, which are not within its normal area of competence. *This is therefore an inappropriate choice*, since it exposes the Commission to great technical difficulties which it might even find insurmountable.

17. The Special Rapporteur would like to discuss this question of the threefold handicap of an artificial, arbitrary and inappropriate choice.

He believes, as do some other members of the Commission, that this choice is not artificial. The quite unique nature of "succession in respect of part of territory", as compared with other types of succession, is the cause—allowing for some ambivalence—of many of the difficulties encountered by members of the Commission and of their doubts as to the desirability of enunciating rules of the kind set out in draft articles 12 to 15. A frontier adjustment, which as such raises a problem of "succession in respect of part of territory", may in some cases affect only a few acres of a territory that may, as for example in the case of the USSR, cover more than 8 million square miles. A frontier adjustment affecting only a few acres of land, such as that which enabled Switzerland to extend the Geneva-Cointrin airport into what was formerly French territory, is really too minor, in the view of some members of the Commission, to raise problems of currency, Treasury and State funds or archives. Thus, the questions covered by draft articles 12 to 15 seem almost unreal in such cases. It is also noted that minor frontier adjustments are usually the subject of agreements settling all the questions arising as a result between the predecessor State ceding territory and the successor State to which it is ceded.

18. While it is true that "succession in respect of part of territory" does cover the case of an insignificant frontier adjustment which, moreover, may result from an agreement providing a general settlement of all the problems involved, it is nevertheless a fact that this type of succession also includes cases affecting very large territories and enormous tracts of land. In those circumstances, the problems covered by draft articles 12 to 15 certainly do arise, and in fact they are particularly acute. It is this situation—namely, the fact that the area affected by the territorial change may be either very large or very small—that accounts for the ambiguities, the uniqueness, and hence the difficulty of the specific case of "succession in respect of part of territory". In short, the magnitude of the problems dealt with in articles 12 to 15 varies with the size of the territory transferred. *These problems arise in each and every case*, but more perceptibly and more conspicuously when the area of the transferred territory is large.

19. What clinches the argument is the fact that problems relating to currency, Treasury and State funds and archives have actually arisen in specific cases of this type of succession and that the Special Rapporteur has given many substantial historical examples throughout his various reports.[14] This incontrovertible reality is simply a reflection of the phenomenon of substitution of sovereignty over the territory in question, which inevitably manifests itself through an extension to the territory of the successor State's own legal order and hence through a change, for example, in the monetary tokens in circulation or in the ownership of the territory's archives. Currency in particular is a very important item of State property, being the expression of a regalian right of the State and the manifestation of its sovereignty.

20. It should be added that cases of "succession in respect of part of territory" do not always involve agreements the existence of which would justify the abandonment of attempts to formulate rules governing succession. Moreover, it is in those cases where a very large part of the territory of a State passes to another State—in other words, precisely the cases in which the problems of currency, Treasury and State funds and archives arise on a larger scale—that agreements for the settlement of such problems may be lacking. This is not a theoretical hypothesis. Apart from war or the annexation of territory by force, both of which are prohibited by contemporary international law, one can envisage the case of detachment of part of a State's territory and its attachment to another State following a referendum on self-determination, or the case of secession by part of a State's population and attachment of the territory in which it lives to another State. In such situations, it is not always possible to count on the existence of an agreement between the predecessor State and the successor State, especially in view of the politically charged circumstances which may surround such territorial changes. In view of the Special Rapporteur, therefore, the choice of the problems dealt with in articles 12 to 15 is not artificial, since it in fact relates to reality.

21. Nor is the choice an arbitrary one. Once it is conceded that "succession in respect of part of territory" may give rise to problems of the kind referred to in articles 12 to

[13] See *Yearbook ... 1975*, vol. I, pp. 108–131, 1325th to 1329th meetings. For the text of the draft articles, see *Yearbook ... 1974*, vol. II (Part One), pp. 103 *et seq.*, document A/CN.4/282, chap. IV, sect. 2, sub-section 1.

[14] To mention only the sixth report, see *Yearbook ... 1973*, vol. II, pp. 34–36, document A/CN.4/267, part four, article 12 and commentary (on currency); *ibid.*, pp. 36–37, article 13 and commentary (on Treasury and State funds) and *ibid.*, pp. 37 *et seq.*, article 14 and commentary (on archives).

15, there remains the observation that, both in this type of succession and in all the others, the categories of State property covered by those articles are not the only ones involved in State succession. According to this point of view, therefore, the list of articles should be lengthened to cover other categories of State property besides those envisaged in articles 12 to 15.

22. In fact, the problems considered in the articles in question are precisely those which arise in all circumstances in every type of succession of States. There are, of course, other kinds of property. It should be borne in mind, however, that the Special Rapporteur has limited his study exclusively to State property, and has thus left aside for the time being any consideration of other categories of public property, such as the property of public establishments (e.g., railways and rolling-stock). If this is kept clearly in mind and care is taken to avoid considering as State property items which actually belong to public establishments or territorial authorities (as was not always the case in the Commission's debate), it will be seen that State property is limited mainly to the categories covered by draft articles 12 to 15. Of course, one can think of other kinds of State property, such as naval vessels or warplanes. However, while one can conceive of a State without a navy, for example, it is impossible to imagine one without a currency, without a Treasury, without funds and without archives. In other words, articles 12 to 15 covered those kinds of State property which are most essential and most widespread—so much so that they can be said to *derive from the very existence of the State*. Seen in that light, there was nothing arbitrary about inquiring into what would become of such State property in cases of succession of States and even limiting the study to those kinds of State property, which represent the common denominators, so to speak, of all States.

23. It should also be borne in mind that, in any event, State property other than that referred to in articles 12 to 15, such as armaments, is covered by the general provision in article 9 (General principle of the passing of State property).

24. There remains the last criticism of the articles proposed by the Special Rapporteur, namely, that they are inappropriate because they expose the Commission to having to formulate draft articles involving such technicalities, economic, financial and other, that they might not be in keeping with the nature and the activities of the Commission. The Special Rapporteur fully appreciated this risk, especially as he himself, throughout his reports, admitted that he was ill at ease among such monetary, financial and Treasury questions because of his lack of familiarity with them.

25. During the debate on draft article 12, concerning currency in the case of "succession in respect of part of territory", one member of the Commission, Mr. Kearney, suggested the following wording as an improvement on the text of article 12:

1. Gold and foreign exchange reserves stored by the predecessor State in the transferred territory and allocated to that territory shall pass to the successor State.

2. 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 the proportion which the average volume of currency in circulation in the transferred territory during the six months prior to the date of succession bears to the average volume of currency in circulation in the predecessor State as a whole during the same period.

3. Currency and monetary tokens of the predecessor State that are in circulation in the transferred territory on the date of succession shall be converted into the currency of the successor State at the exchange rate notified to the International Monetary Fund or, if there is no such exchange rate, at the average of the middle rate in the financial markets of the predecessor State and of the successor State on the date of succession. Currency and tokens acquired by the successor State in the conversion shall be delivered to the predecessor State together with any gold and foreign exchange reserves stored in the transferred territory but not allocated to that territory.[15]

Tribute is due to the author for the pains he took to prepare this draft. However, this suggestion, and others that may be submitted, could be an indication of the kind of highly technical and complex article 12 which might eventually emerge. Consequently, it seems safe to say that this approach may take us very far into the formulation of draft articles which are too complex and, in the final analysis, inappropriate.

26. Under the circumstances, the Special Rapporteur requested the Commission to clarify its intentions[16] so that a choice could be made between the method which he has used provisionally thus far and which led him to propose, for each type of succession, articles as non-technical as possible on such topics as currency, Treasury and archives, and a radically different method which would involve drafting, for each type of succession, more general articles not relating *in concreto* to each of these kinds of State property. The second method appeared on the face of it to be more attractive in that, in all probability, it would have facilitated the Commission's task by sparing it the major problems it would inevitably have encountered in dealing with financial technicalities with which it is certainly not familiar, and might ultimately have made the proportions of the draft more acceptable, since the number of articles would have been smaller because of their general nature. However, the Commission was unable to take up this point, with the result that the Special Rapporteur is still uncertain as to its real preferences.

27. The Special Rapporteur had proposed articles on the most important kinds of State property which seemed to him to be affected by succession of States. The initial discussion on this subject showed that, while some members favoured following him along those lines, others suggested exploring another approach which would have resulted in the formulation of some more general articles. The Special Rapporteur is again trying this latter approach, which he adopted in some of the earlier reports[17] and which was explored by one member of the Commission during the debate on draft article 12.[18] That is the object of the present

[15] *Yearbook ... 1975*, vol. I, p. 130, 1329th meeting, para. 46.

[16] *Ibid.*, p. 131, para. 52

[17] See above, para. 2.

[18] Mr. Ushakov suggested to the Special Rapporteur a general article 12, worded as follows:

"1. When part of a State's territory becomes part of the territory of another State, the passing of State property of the predecessor State to

(*Continued on next page.*)

study. If the Commission finds this approach satisfactory, it will follow it by considering the proposals in this report. If not, it will always be free to revert to the seventh report and continue its consideration of it. No mention has been made of a third course which is also possible, namely, to combine the first two and formulate for each type of succession one or two articles of a general character, perhaps adding one or two more relating to specific kinds of State property.

28. For the time being, the Special Rapporteur proposes in the present report to proceed as indicated above by formulating general texts. Section 2 below (provisions relating to each type of succession of States) will be divided into three parts relating respectively to: (*a*) Succession in respect of part of territory; (*b*) Newly independent States; (*c*) Uniting and separation of States.

29. However, before the members of the International Law Commission are presented with a study and draft articles based on the distinction between movable and immovable property, it is important to know whether this distinction is familiar to the various national legal systems. Consequently, the Special Rapporteur will (1) examine English, French, Soviet and Moslem law as examples, and (2) attempt a synthesis and classification.

E. Distinction between movable and immovable property

1. Distinction in different national legal systems

(a) *English law*[19]

30. Under English law, property is divided basically into real property and personal property, these terms having quite different meanings from "*propriété réelle*" and "*propriété personnelle*". In order to understand this distinction, it is necessary to disregard all the concepts inherited from Roman law, particularly the notions of the "right *in rem*" and the "right *in personam*". English law is in no way concerned with making theoretical classifications and is therefore entirely procedural in origin; in other words, its present principles derive not from doctrinal research, but from procedural elements employed for centuries past in individual cases. The term "real property" accordingly refers to rights which, before the procedural reform of 1833, were secured by "real" actions, and the term "personal property" to those secured by "personal" actions. A glance at the procedure followed until the nineteenth century serves to explain this terminology.

31. This rather complex procedure involved two types of possible actions. First there were real actions, to secure rights that were particularly important in feudal society. These rights were consequently protected for their own sake and without any reference to the person possessing them. Secondly, there were personal actions, to protect rights that were considered less important. Since they could not be protected for their own sake, an oblique approach involving reference to the person possessing the right was employed: impairment of the right is tantamount to impairment of the person of the petitioner; hence the term "personal action". The distinction between real and personal property therefore has nothing to do with the physical nature of the property.

However, the most important interests prevailing in feudal society were of course those concerning immovables, essentially the land itself, inasmuch as the economic values of movables was not recognized until the present era. In practice if not in theory, therefore, real property has to do with the law of immovable property. It should be noted in passing that the English term "property" does not mean "*propriété*" (ownership), but involves the notion of "*biens*". The law of property is the *droit des biens*. Will this mean eventually that personal property can actually be assimilated to the *droit des biens mobiliers*? English law is moving in that direction, particularly since the reform of 1925, so that the differences between real and personal property may now be reduced to the differences which exist in French law between "*immeubles*" and "*meubles*".

32. But there remains one important consequence of the original definition: from the feudal conception of ownership, which at that time was also sovereignty, there has derived the principle that no one can have full ownership of immovables because no one, except the king, could combine and retain all the attributes of ownership. In contrast to French law, the basic rule for the ownership of immovable property is fragmentation: one never has ownership, in the full sense, of an immovable, but only an interest or "estate". There are a number of kinds of estate, the commonest of which, the estate in fee simple, corresponds in effect to ownership (*propriété*) as it is known in continental European law—in other words, combining *usus, fructus* and *abusus*.

33. This state of affairs has a curious terminological consequence which may be mentioned in conclusion: English is the only language which has a special term meaning "to be the proprietor of", namely, "to own". But this verb, and the corresponding noun "ownership", cannot in any case be used with respect to "real property". In this connexion, René David writes: "One may own goods but, strictly speaking, one never owns land or a house according to the law."[20]

(*Foot-note 18 continued*)

the successor State shall be settled by agreement between the predecessor and successor States.

"2. In the absence of the agreement referred to in paragraph 1:

(*a*) the immovable State property of the predecessor State situated in the territory to which the succession of States relates shall pass to the successor State;

(*b*) the movable State property of the predecessor State connected with the activity of the predecessor State in the territory to which the succession of States relates shall pass to the successor State;

(*c*) the movable State property other than that mentioned in subparagraph (*b*) shall pass to the successor State in an equitable proportion." (*Yearbook ... 1975*, vol. I, p. 123, 1328th meeting, para. 10.)

[19] For these researches into comparative law, the Special Rapporteur used the following sources: F. H. Lawson, *The Rational Strength of English Law* (1951), pp. 75–106; René David, *Les grands systèmes de droit contemporain*, 7th ed. (Paris, Dalloz, 1975); René David, *Le droit anglais*, 3rd ed. (Paris, Presses universitaires de France, "Que sais-je?" collection, No. 1162, 1975).

[20] René David, *Le droit anglais* (*op. cit.*), p. 103.

(b) *French law*[21]

34. The key to the matter is to be found in articles 516, 517 and 527 of the French Civil Code. The basic distinction between kinds of property is set out in article 516, which states that "all property is either *meuble* or *immeuble*". According to article 517, "property is immovable by nature, or by destination, or by the object to which it applies". Accordingly, French law distinguishes between "*immovables by nature*" (such as land or objects incorporated with or attached to the land), "*immovables by destination*" (such as things placed in a tenement (*fonds*) for its service and exploitation—e.g., agricultural implements—or fixtures permanently attached to the tenement—e.g., a mirror or a picture), and "*immovables by the object to which they apply*" (comprising both rights *in rem* over immovables, such as usufruct of immovable property or a mining concession, and real estate shares). In the case of movables, which are regulated by article 527 of the French Civil Code, a distinction is made between "*movables by nature*" (such as corporeal movables) and movables "*by determination of the law*" (such as, firstly, rights which constitute movable property because of the object to which they apply—e.g., debt-claims and shares in public companies—and secondly, annuities, interests in private companies or partnerships, and incorporeal property).

35. Thus, in French law the criteria for the distinction are physical (the nature of the property) or economic (the use to which the property is put) in the case of corporeal property. In the case of incorporeal property, on the other hand, the object of the right and determination by law are used as criteria. Historically, the distinction between corporeal and incorporeal property derives from Roman law, while the distinction between movables and immovables derives from ancient French law. In mediaeval society, all power, economic or political, came from the land, and that explains why French law attaches more importance to immovables than to movables, although the adage *res mobilis, res vilis* is now outdated. The basic reason is that immovable property is a portion of territory remaining constantly under the control of the sovereign, while movable property is apt to elude such control. To sum up, the distinction between movables and immovables in French law is based on the physical attributes and economic utility of the property concerned.

(c) *Soviet law*[22]

36. The basic distinction made in Soviet law in accordance with Marxist theory is between *production property* and *consumption property*. It should first of all be explained that "consumption property" does not mean the consumables of Roman law, in the sense of things which are destroyed by the first use made of them; it means items intended to meet the material and cultural needs of the individual. Only this category of property can be subject to private appropriation, which is termed "personal ownership". This distinction is made in accordance with the Marxist theory that the law is conditioned by the economic structure of society. Thus, the mode of administration of property is of great importance, whereas under the capitalist system the owner is sovereign and the mode of administration is irrelevant.

37. The State may own property of any kind. Article 6 of the Soviet Constitution lists a number of things which are State property and which cannot, therefore, be freely alienated by the State (a constitutional amendment would be necessary). They include the land, forests, mines, railways, banks, postal facilities and so forth. The important point is that the State being the owner, has the right to possess, utilize and dispose of this property but that it is other bodies corporate, such as the collective farms, or social organizations, which exercise it because they have a right of "operational management". The latter right must be exercised within the limits of the purpose of the body corporate concerned and in accordance with planning objectives and the intended use of the property. There is therefore no distinction between movables and immovables, this being a consequence of State ownership of the land, since, as Jean Carbonnier points out, article 21 of the Soviet Civil Code provides that "the land is the property of the State ... *Note:* With the abolition of private ownership of the land, the distinction between movable and immovable property is also abolished".[23]

(d) *Moslem law*[24]

38. Moslem law distinguishes between movable and immovable property. Although doctors of Islamic law have sometimes excelled in elaborating this distinction by making numerous divisions and subdivisions within each of these two categories of property, they have nevertheless adhered to the unified concept of the patrimony (*al māl*) and its protection. Originally, in writings on Moslem law, the distinction between movable and immovable property was made, not in defining the nature or legal characteristics of such property, but on the basis of a consideration of certain rights *in rem* such as sale, exchange, the constitution of property in mortmain (*waqf* or *habous* property), the right of pre-emption (*chofâa*), hypothecation, and so forth. It is in considering these rights *in rem* and their application that doctors of Moslem law have made the distinction between movable and immovable property, based firstly on the mobility of the property and secondly on its physical nature. These are the two basic criteria: any property which can move or be moved is a movable (*manqūl*), and any which cannot move or be moved is an immovable (*asl* or *aqār*).

39. Moreover, the classification of property according to its physical nature has led to a proliferation of categories of movable property. In the work cited above, Ibn 'Asim makes a breakdown of property into immovable property, movable articles, edible and fungible articles, gold and silver, vegetable products and animate beings (domestic animals, birds, fish, etc.). Immovable property means not

[21] For French law, see Jean Carbonnier, *Droit civil*, vol. 3, *Les biens*, 6th ed. (Paris, Presses universitaires de France, 1969), J.-Ph. Lévy, *Histoire de la propriété* (Paris, Presses universitaires de France, "Que sais-je?" collection, No. 36, 1972).

[22] R. David, *Les grands systèmes ...* (*op. cit.*); M. Lesage, *Le droit soviétique* (Paris, Presses universitaires de France, "Que sais-je?" collection, No. 1052, 1975).

[23] J. Carbonnier, *op. cit.*, p. 68.

[24] Ibn 'Asim, *Tohfa'*, Arabic text with translation into French by O. Houdas and F. Martel (Algiers, Gavault Saint-Lager, 1882) pp. 343 *et seq.*

only land and buildings but also everything attached to the land, such as trees and plantations.

40. In Moslem law, this classification of property is irrelevant in determining the competence of the judge, because of the principle of the single judge (*qādī*), a system applied in the earliest days of Islam and still in effect in some Moslem countries. On the other hand, this classification is basic to the exercise of certain rights *in rem*. For instance, the *chofâa*, or right of pre-emption, can be exercised only over immovables; the sale of the property of a minor by the guardian is regulated differently depending on whether movables or immovables are involved; as regards the risks involved in sale, the rules vary according as the property sold is movable or immovable; and so on.

2. Tentative synthesis and classification

41. Despite the considerable differences due to the particular principles on which societies are founded, the criteria applied in the development of the law of property can be classified under three headings: economic and, implicitly, physical in English and Moslem law; physical and economic in French law; purely economic in Soviet law. The only universal element is the economic one. Thus, even in systems of law applying the physical criterion, property is considered less in terms of its nature than in terms of its use for human needs. How, then, can we define property from the standpoint of apportionment between the predecessor State and the successor State and in a way that is acceptable to all legal systems?

42. It would seem that the problem of devising such a classification should be approached from the standpoint of physical and economic considerations. State sovereignty developed historically over land. Whoever possessed land possessed economic and political power, and this is bound to have a far-reaching effect on present-day law. Consequently, modern State sovereignty is based primarily on a tangible element: territory. It can therefore be concluded that everything linked to territory, in any way whatever, is a base without which a State cannot exist, irrespective of its political or legal system.

43. But what kind of linkage is involved? First of all, a physical one, and here it is necessary to introduce a distinction arising out of the very nature of things. Some property is physically linked to territory so that it cannot be moved. This is immobilized property. Then there are other kinds of property which are capable of being moved, so that they can be taken out of the territory or, in other words, be made to elude State sovereignty. It seems certain that these two categories of property cannot be given identical treatment and that in the event of State succession the two cases must be considered separately, irrespective of the legal systems of the predecessor State and the successor State. Next there is economic linkage, because this question is inseparable from the question of the exercise of sovereignty. Corporations, and the State in particular, tend to monopolize profitable "production property", even in capitalist countries. This is an outcome of economic and social circumstances. Mr. Bilge also called attention to this point about the importance of the economy when he proposed, during the discussion in connexion with draft article 9, that there should be a reference to the purpose for which the property was used.[25] In this connexion, it is interesting to note the definition given by the Italian jurist, F. Carnelutti: "Movables are things whose *usefulness depends* and immovables are things whose *usefulness does not depend* on their movement."[26]

44. A question of terminology arises next. How should property be described? The simplest solution would no doubt be to follow Mr. Ushakov's suggestion and distinguish between immovable State property and movable State property, thus applying a primarily physical criterion for differentiation. However, it seems desirable to make it clear that this is not a matter of leaning towards universal application of the laws of those systems that derive purely from Roman law, because, as the Special Rapporteur has already pointed out on the subject of distinguishing between public domain and private domain, a notion of internal law should not be referred to, as in any case it does not exist in all legal systems.[27] The distinction made here has nothing to do with the rigid legal categories found, for example, in French law.[28] It is simply that the terms "movable" and "immovable" seem most appropriate for designating property which can be moved or which is immobilized.

45. At this stage of the study, account should be taken of the idea of utility, for while it is true that an item of immovable property is likely, because of its characteristics, to be linked to territory and consequently to sovereignty, the fact that an item of property is movable does not mean that it will not be necessary to the exercise by a State of its sovereignty. Currency is but one example of this. On the basis of these observations, therefore, property can generally be considered to be linked to the exercise of sovereignty if it is State property physically linked to territory, i.e., immovable property of all kinds, or State property which is not physically linked to territory, i.e., movable property, but which has a direct and necessary link with the territory in question. The problem of the passing of State property from the predecessor State to the successor State will accordingly be considered separately for each type of succession in view of the obvious differences due, first, to the political environment in each of the cases where a change of sovereignty occurs, and, secondly, to the various constraints which the movable nature of certain kinds of property places on the quest for solutions.

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[25] See *Yearbook ... 1975*, vol. I, p. 84, 1320th meeting, para. 13.

[26] Quoted by J. Carbonnier, *op. cit.*, p. 69.

[27] See *Yearbook ... 1975*, vol. I, p. 73, 1318th meeting, para. 10.

[28] See para. 34 above.

CHAPTER III

New draft articles 12 to 17

SECTION 2. PROVISIONS RELATING TO EACH TYPE OF SUCCESSION OF STATES

SUB-SECTION 1. SUCCESSION IN RESPECT OF PART OF TERRITORY

Article 12. succession in respect of part of territory as regards State property situated in the territory concerned

When territory under the sovereignty or administration of a State becomes part of another State:[29]

(*a*) the ownership of immovable property of the predecessor State situated in the territory to which the succession of States relates shall, unless otherwise agreed or decided, pass to the successor State;

(*b*) the ownership of movable property of the predecessor State which, on the date of the succession of States, is situated in the territory to which the succession of States relates, shall also pass to the successor State:

(i) if the two States so agree, or

(ii) if there is a direct and necessary link between the property and the territory to which the succession of States relates.

COMMENTARY

(1) The definition of succession in respect of part of territory given here by the Special Rapporteur is the one used by the International Law Commission in 1972 in the case of the draft articles on succession of States in respect of treaties. A more precise but more unwieldy variant for the same draft adopted by the Commission in 1974 on second reading, appears in the foot-note.

(2) In his approach to the first article on succession of States in respect of part of territory, the Special Rapporteur is attempting to make a twofold distinction, first, according to the nature of the property—movable or immovable—and secondly according to where the property is situated on the date of the succession of States. That is why there are two articles dealing with the passing of State property, namely, article 12, concerning property situated in the territory to which the succession of States relates, and article 13, concerning property situated outside that territory. That is also the reason for the existence, in article 12, of the two subparagraphs (*a*) and (*b*), the first relating to immovable property and the second to movable property.

(3) Subparagraph (*a*) of article 12 enunciates the principle of the passing of immovable property from the predecessor State to the successor State in the case of a succession in respect of part of territory. From this standpoint it is quite in keeping with article 9, establishing the general principle of the passing of State property, of which it is merely the application in the case of a particular type of State succession. Like article 9, subparagraph (*a*) of article 12 applies to the case of property situated in the territory to which the succession of States relates.

(4) The immovable State property which thus passes to the successor State in case of a succession in respect of part of territory is property which the predecessor State formerly used, in the portion of territory concerned, for the manifestation and exercise of its sovereignty or of the performance of the general duties implicit in the exercise of that sovereignty, such as the defence of that portion of territory, security, promotion of public health and education, national development, and so on. Such property can easily be listed: it includes, for example, barracks, airports, prisons, fixed military installations, State hospitals, State universities, local government office buildings, premises occupied by the main central government services, buildings of the State financial, economic or social institutions, and postal and telecommunications facilities where the predecessor State was itself responsible for the functions which they normally serve.

A. *Devolution of State property in legal theory, judicial decisions and State practice*

(5) *The devolution of such State property is clearly established practice.* There are, moreover, very many international instruments which simply record the express relinquishment by the predecessor State, without any *quid pro quo,* of all public property without distinction situated in the territory to which the succession of States relates. It may be concluded that relinquishment of the more limited category of *immovable State* property situated in that territory should *a fortiori* be accepted.

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

(7) The first type comprises all cessions of territories against payment. The purchase of provinces, territories and the like was an accepted practice in centuries past but has been tending towards complete extinction since the First World War, and particularly since the increasingly firm recognition of the right of peoples to self-determination. It follows from this right that the practice of transferring the territory of a people against payment must be condemned. Clearly,

[29] *Variant:* **"When part of the territory of a State, or when any territory, not being part of the territory of a State, for the international relations of which that State is responsible, becomes part of the territory of another State . . .".**

these old cases of transfer are not longer demonstrative. On purchasing a territory, a State purchased everything in it, or everything it wanted, or everything the other party wanted to sell there, and the transfer of State property does not constitute proof of the existence of the rule, which in this case is replaced by the mere capacity to pay.[30]

(8) The second type consists of *forced cessions of territories*, which are prohibited by international law, so that succession to property in such cases cannot be regulated by international law.[31] In this connexion, it may be recalled that the Commission has adopted, on the proposal of the Special Rapporteur, a draft article 2 reading 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.

(9) A third set of cases which are, perhaps, only too demonstrative consists of those involving *voluntary cessions without payment*. In these very special and marginal cases, the passing of immovable State property is neither controversial nor ambiguous because it takes place not so much under the general principle of succession of States as by an expressly stated wish.[32]

(10) Cases of "succession in respect of part of territory" have occurred relatively often following a war. In such cases, peace treaties contain provisions relating to territories ceded by the defeated Power. For that reason, the provisions of peace treaties and other like instruments governing the problems raised by transfers of territory must be treated with a great deal of caution, if not with express reservations.

(11) Subject to that proviso, it may be noted that the major peace treaties which ended the First World War opted for the devolution to the successor States of all public property situated in the ceded German, Austro-Hungarian or Bulgarian territories.[33]

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

The Treaty of Peace concluded on 12 March 1940 between Finland and the USSR[34] provided for reciprocal territorial cessions and included an annex requiring that all constructions and installations of military or economic importance situated in the territories ceded by either country should be handed over intact to the successor. The protocol makes special mention of bridges, dams, aerodromes, barracks, warehouses, railway junctions, manufac-

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[30] See, for example, the Convention of Gastein of 14 August 1865 whereby Austria sold Lauenburg to Prussia for the sum of 2.5 million Danish rix-dollars (English text in *British and Foreign State Papers, 1865–1866* (London, William Ridgeway, 1870), vol. 56, p. 1026; French text in *Archives diplomatiques, 1865* (Paris, Aymot, 1865), vol. IV, p. 6); the Treaty of Washington of 30 March 1867 whereby Russia sold its North American possessions to the United States of America for $1.2 million (English text in W. M. Malloy, *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. 1521; the Convention whereby France ceded Louisiana to the United States of America for $15 million (English and French texts in G. F. de Martens, ed., *Recueil des principaux traités* (Göttingen, Librairie Dieterich, 1831), vol. VII, pp. 706 and 707).

[31] In former times, such forced cessions were frequent and widespread. Of the many examples which history affords, one may be cited here as documentary evidence of the way in which the notion of succession to property that was linked to sovereignty could be interpreted in those days. Article XLI of the Treaty of the Pyrenees, which gained France the places of Arras, Béthune, Lens, Bapaume, and so forth, specified that the places in question

> "... shall remain ... unto the said Lord the most Christian King, and to his Successors and Assigns ... with the same rights of Sovereignty, Propriety, Regality, Patronage, Wardianship, Jurisdiction, Nomination, Prerogatives and Preeminences upon the Bishopricks, Cathedral Churches, and other Abbys, Priorys, Dignitys, Parsonages, or any other Benefices whatsoever, being within the limits of the said Countrys ... formerly belonging to the said Lord the Catholick King ... And for that effect, the said Lord the Catholick King ... doth renounce [these rights] ... together with all the Men, Vassals, Subjects, Boroughs, Villages, Hamlets, Forests ... the said Lord the Catholick King ... doth consent to be ... united and incorporated to the Crown of France; all Laws, Customs, Statutes and Constitutions made to the contrary ... notwithstanding." (English text in F. Israel, ed., *Major Peace Treaties of Modern History, 1648–1967* (New York, Chelsea House publishers in association with McGraw-Hill Book Co., 1967), vol. I, pp. 69–70; French text in J. Du Mont, *Corps universel diplomatique du droit des gens, contenant un recueil des traitez d'alliance, de paix, de trêve* ... (Amsterdam, Brunel, 1728), vol. VI, part II, p. 269).

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

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

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

[32] See, for example, the cession by Great Britain to the United States in 1850 of part of the Horse-Shoe Reef in Lake Erie; the decision in July 1821 by an assembly of representatives of the Uruguayan people held at Montevideo concerning the incorporation of the Cisplatina Provice; the voluntary incorporation in France of the free town of Mulhouse in 1798; the voluntary incorporation of the Duchy of Courland in Russia in 1795; the Treaty of Rio of 30 October 1909 between Brazil and Uruguay for the cession without compensation of various lagoons, islands and islets; the voluntary cession of Lombardy by France to Piedmont, without payment, under the Treaty of Zurich of 10 November 1859; etc.

[33] Articles 256 of the Treaty of Versailles (*British and Foreign State Papers, 1919*, vol. 112, p. 125), 208 of the Treaty of Saint-Germain-en-Laye (*ibid.*, pp. 412–414), 191 of the Treaty of Trianon (*ibid.* (*1920*), vol. 113, pp. 564–565), and 142 of the Treaty of Neuilly-sur-Seine (*ibid.* (*1919*), vol. 112, pp. 821–822).

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

turing enterprises, telegraphic installations and electric stations.

The Treaty of Peace of 10 February 1947 between the Allied and Associated Powers and Italy also contained provisions dealing with various cases of "succession in respect of part of territory" and applying the principle of the passing of property, including immovable property, from the predecessor State to the successor State. In particular, paragraph 1 of annex XIV to the Treaty provided that "The successor State shall receive, without payment, *Italian State** and para-statal *property** within territory ceded to it . . ."[35]

(12) Article V of the Treaty of Cession of the Territory of the Free Town of Chandernagore,[36] signed at Paris by India and France on 2 February 1951, states that "The Government of the French Republic transfers ... *all the properties owned by the State** and the public bodies lying within the territory of the Free Town . . ."[37]

Similarly, the return to the Moroccan State of the international Town of Tangier was carried out in a manner which supports to a great extent the principle set out in article 12. Under the terms of article 2 of the protocol annexed to the Final Declaration of the International Conference in Tangier (29 October 1956), the Moroccan State, which recovered all its property in Tangier, also succeeded to all the property of the International Administration of the Town: "The Moroccan State, which recovers possession of the public and private domain entrusted to the International Administration ... receives the latter's property . . ."[38]

(13) Courts and other jurisdictions also seem to endorse unreservedly the principle of the devolution of public property in general, and *a fortiori* of State property and therefore of immovable property. This is true, in the first place, of national courts. Rousseau writes: "The general principle of the passing of public property to the new or annexing State is now accepted without question by national courts."[39] Decisions of international jurisdictions confirm this rule. In the Peter Pázmány University case, the Permanent Court of International Justice stated in general terms (which is why the statement can be cited in this context) the principle of the devolution of public property to the successor State. According to the Court, this is a "*principle of the generally accepted law of State succession**".[40]

(14) In cases of "succession in respect of part of territory", the Franco-Italian Conciliation Commission established under the Treaty of Peace with Italy of 10 February 1947 confirmed the principle of the devolution to the successor State, in full ownership, of immovable State property. This can be readily deduced from one of its decisions. The Commission found that "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".[41]

(15) It will thus be seen that legal theory, judicial decisions and State practice generally admit devolution of the public property of the predecessor State. The illustrations given by the Special Rapporteur seemed in each case to be broader in scope than the rule he has suggested. Nevertheless, he considered it preferable to concentrate exclusively on finding the least common denominator.

B. *The problem of movable property in cases of succession in respect of part of territory*

(16) The Special Rapporteur is more or less convinced that the problem of movable property does present itself in a very special manner in cases of "succession in respect of part of territory". The special aspects of the problem in these cases cannot be due solely to the fact that the property in question is movable; if that were so, the problem would present itself similarly in all types of succession of States and there would thus be nothing special about it. They seem in fact to be due rather to the actual type of succession which involves part of a territory. Let us consider first those special aspects which are due to the movable nature, and the mobility, of State property.

1. *Special aspects due to the mobility of the property*

(17) The fact that the State property in question is movable

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

[36] It will be recalled that the Commission assimilated the case of decolonization of a Non-Self-Governing Territory by integration with a State other than the colonial State to "succession in respect of part of territory" (see para. 10 above).

[37] United Nations, *Treaty Series*, vol. 203, p. 158.

[38] *Ibid.*, vol. 263, p. 171. The example of the Town of Tangier, cited here after that of the Town of Chandernagore, is mentioned for the purpose of illustration, although in fact it does not fit into any type of succession; the International Administration was not a predecessor *State* any more than Morocco, to which Tangier had always belonged, was a *successor* State.

[39] Charles Rousseau, *Cours de droit international public—Les transformations territoriales des Etats et leurs conséquences juridiques* (Paris, Les Cours de droit, 1964–1965), p. 139. Reference is generally made to the judgement of the Berlin Court of Appeal (*Kammergericht*) of 16 May 1940 (case of the succession of States to Memel—return of the territory of Memel to the German Reich following the German-Lithuanian Treaty of 22 March 1939 (H. Lauterpacht, ed., *Annual Digest and Reports of Public International Law Cases, 1919–1942, Supplementary Volume* (London), case No. 44, pp. 74–76), which refers to the "comparative law" (a mistake for what the context shows to be "the ordinary law") of the passing of public property to the successor. Reference is also made to the judgement of the Palestine Supreme Court of 31 March 1947 (case of Amine Namika Sultan *v.* Attorney-General (H. Lauterpacht, ed., *Annual Digest . . . , 1947*, case No. 14, pp. 36–40)), which recognizes the validity of the transfer of Ottoman public property to the (British) Government of Palestine, by interpretation of article 60 of the Treaty of Lausanne of 1923.

[40] Judgment of 15 December 1933, Appeal from a judgment 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, p. 237.

[41] 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), p. 514).

Annex XIV, para. 1, provided that "The successor State shall receive, without payment, *Italian State and para-statal property* within territory ceded to it . . ." (United Nations, *Treaty Series*, vol. 49, p. 225).

does, of course, add a special dimension of difficulty to the problem of succession of States in these cases; it may seem farcical to spell out a rule when it is known in advance that the application of it can only be left to the good faith and good will of the predecessor State, since the fact that the property is movable and therefore can be moved at any time makes it easy to place it out of reach of any succession. To regulate the treatment of *movable* property "situated" in a territory, as though it was fixed there, might therefore seem absurd or naïve. The Special Rapporteur accordingly suggests that the Commission should take precautions against both of these. First, to avoid absurdity, it should specify that it is referring to movable property which, *on the date of the succession of States*, was actually situated in the territory to which the succession of States relates. The artificiality and absurdity of "anchoring" such property to the territory in question, when it can by its very nature be removed from it, is thus eliminated. It is no longer absurd to refer to movable property actually "situated" in the territory, since on the date of the succession of States the property was in fact there. The Commission will thus avoid giving the impression that it is enunciating a rule which would be rendered pointless by the disappearance of the property in question.

(19) However, while this eliminates the absurdity, the fact that everything depends on the goodwill of the predecessor State means that the Commission is exposed to the risk of enunciating a rule the application of which would, in the final analysis, be left entirely to the discretion of the predecessor State. Hence the need for a second precaution, this time against naïveté. The rule should be formulated in such a way as somewhat to ease the constraints created by the movable or mobile nature of the State property in question. This rule might be based on the following two considerations: the mere fact that movable property is situated in the territory to which the succession of States relates should not automatically entitle the successor State to claim such property, nor should the mere fact that the property is situated outside the territory automaticaly entitle the predecessor State to retain it. In order for the predecessor State to retain or the successor State to acquire property, *conditions* other than the too simple and convenient one of where the property is situated must be met. The task now is to determine what those other conditions are.

(20) They are not unrelated to the general conditions concerning *viability* both of the territory to which the succession of States relates and of the predecessor State. They are closely linked to the general principle of *equity*, which should never be lost from view. A territory stripped of those of its archives which are most essential to its everyday administration will be able to survive only with great difficulty. The predecessor State must not unduly exploit the mobility of the State property in question, to the point of seriously disorganizing the territory which it is handing over and of jeopardizing its viability. Attention should therefore be drawn to the "natural" limits beyond which the predecessor State cannot go without failing in an essential international duty. The Special Rapporteur accordingly suggests that the direct link and the necessary relationship between movable property and the territory to which the succession of States relates should be taken into account.

(21) Any movable property of the predecessor State which is in the territory being handed over quite by chance at the time when the succession of States occurs should not, *ipso facto*, or purely automatically, pass to the successor State. If only the place where the property is situated were taken into account, that would in some cases constitute a breach of equity.

(22) Moreover, the fact that State property may be where it is purely by chance is not the only reason for caution in formulating the rule. There may even be cases where the predecessor State situates movable property, not by chance, but deliberately, in the territory to which a succession of States will relate, without that property's having a direct and necessary link with the territory, or at least without its having such a relationship to that territory *alone*. In such a case, it would be inequitable to leave the property to the successor State *alone*. For example, it might be that the country's gold reserves or the metallic cover for the currency in circulation throughout the territory of the predecessor State had been placed in the territory to which the succession of States relates. It would be unthinkable, merely because the entire gold reserves of the predecessor State were in the territory to be handed over, to allow the successor State to claim them if the predecessor State was unable to evacuate them in time.

(23) On the other hand, while the presence of movable State property in the part of the territory which remains under the sovereignty of the predecessor State after the succession of States normally justifies the presumption that it should remain the property of the predecessor State, such a presumption, however natural it may be, is not necessarily irrefutable. The mere fact that property is *situated* outside the territory to which the succession of States relates cannot *in itself* constitute an absolute ground for retention by the predecessor State of the right of ownership of such property. If the property is linked solely, or evern concurrently, to the territory to which the succession of States relates, equity and the viability of the territory require that the successor State should be granted a right to the property in proportion to the extent of its relationship to the territory.

(24) However, as the Special Rapporteur has indicated,[42] the problem of movable State property has some remarkable special aspects not so much, perhaps, because of the mobility of such property (which has just been discussed) as because of the special nature of "succession in respect of part of territory", which must be considered next.

2. *Special aspects due to the nature of the succession of States*

(25) In the case of the merging or uniting of States, the starting-point is the existence of two States, or, in other words, of two distinct juridical orders. The mobility of State property is naturally limited by political boundaries (e.g., in the case of the currency in circulation in each of the two States). If movable property (e.g., a government vehicle) were to cross those frontiers, the fact of its being *foreign* property is what would distinguish it in the neighbouring

[42] See para. (16) above.

State where it would temporarily be. In every case of merger, the movable property of State A and that of State B was easily identifiable before the union, either because it had remained within the geographical boundaries of the State to which it belonged or because, having crossed those boundaries, it automatically acquired in the neighbouring State the distinctive status of foreign property.

(26) The same is true, at least from the standpoint with which we are concerned, in the case of newly independent States. The Non-Self-Governing Territory is distinct, and usually very remote geographically, from the colonial State. Moreover, in accordance with the colonial principle of "special laws", the Non-Self-Governing Territory is governed by legislation distinct from that in force in the metropolitan territory, so that it is not wrong to say that in some respects, in this case also, there are two different juridical orders. Thus, here again the property of the colonial State is relatively easy to identify.

(27) The situation is different in the case of a "succession in respect of part of territory". In this case, before the succession of States occurs there is only one juridical order, namely, that of the State a part of whose territory will later be detached. All the movable State property involved in such a succession belonged solely to one State. In other words, "succession in respect of part of territory" clearly involves the *fragmentation* of a previously undifferentiated *unitary* whole, whereas the other cases of succession generally involve two entities which were already distinct prior to their separation or their uniting or merging. In the case of "succession in respect of part of territory" there is no differentiation, in that up to the time when the succession of States occurs there is only *one* rightful owner of *all* movable State property, namely, the predecessor State. The difficulty—as compared with cases of merger or uniting of States, for example—is that not *all* movable State property, irrespective of where it is situated, will be affected by the succession of States, but only part of it. But what part? That is the problem. The part situated in the territory to which the succession relates? That is so in most cases, but not in each and every one if equity is taken into account. And what of the part situated outside that territory on the date of the succession of States? Normally it should not be affected by the succession, although the principle must be qualified so as not to conflict with that very equity which is so highly prized.

(28) The point is that, in addition to the special nature of succession in respect of part of territory, the problem is complicated by the fact that some State property is immaterial or incorporeal, or belongs to the entire national community, which contributed as a whole to its formation and development. Thus, handing over all such property to the successor State would clearly injure the community remaining under the same sovereignty, just as withholding it from the successor State will to some extent injure the inhabitants of the ceded territory. The only solution left in this case is to reconcile considerations of equity as much as possible with the requirements of viability both for the predecessor State and for the territory to which the succession of States relates.

C. *The direct and necessary relationship between property and territory*

(29) A study of the practice of States shows in various ways that the condition for the passing to the successor State of an item of property situated in the transferred territory seems in fact to be the existence of a direct and necessary link between the property and the territory in question. As examples, the cases of currency and gold and foreign exchange reserves, State funds and archives will be discussed in turn below.

1. *Currency*

(30) *A definition of currency* for the purposes of international law should take account of the following three fundamental elements: (*a*) currency is an attribute of sovereignty; (*b*) it circulates in a given territory and (*c*) it represents purchasing power.[43] Dominique Carreau observes that this legal definition

> ... necessarily relies on the concept of statehood or, more generally, that of *de jure* or *de facto* sovereign authority. It follows from the proposition that media of exchange in circulation are, legally speaking, not currency unless their issue has been established or authorized by the State, and, *a contrario*, that currency cannot lose its status otherwise than through formal demonetization.[44]

(31) For the purposes of our subject, this means that the predecessor State loses and the successor State *exercises its own monetary authority* in the territory to which the succession of States relates. That should mean that at the same time the State patrimony associated with the expression of monetary sovereignty in that territory (gold and foreign exchange reserves, and real property and assets of the institution of issue situated in that territory) must pass from the predecessor State to the successor State.

(32) *The normal relationship between currency and territory* is expressed in the idea that currency can circulate only in the territory of the issuing authority. The concept of the State's "territoriality of currency" or "monetary space" implies, first, *the complete surrender by the predecessor State of monetary powers in the territory considered* and, secondly, *its replacement by the successor State in the same prerogatives in that territory*. But both the surrender and the assumption of powers must be organized on the basis of a factual situation, namely, the impossibility of leaving a territory without any currency in circulation on the day on which the State succession occurs. The currency inevitably left in circulation in the territory by the predecessor State and retained temporarily by the successor State justifies the latter in claiming the gold and foreign exchange which constitute the security or backing for that currency. Similarly, the real property and assets of any branches of the central institution of issue in the territory to which the State succession relates pass to the successor State under this principle of the State's "currency territoriality" or "monetary

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[43] *Yearbook ... 1974*, vol. II (Part One), p. 104, document A/CN.4/282, chap. IV, article 12, para. (5) of the commentary.

[44] D. Carreau, *Souveraineté et coopération monétaire internationale* (Paris, Cujas, 1970), p. 27.

space". It is because the circulation of currency implies security or backing—the public debt, in the last analysis—*that currency in circulation cannot be dissociated from its base or normal support, which is formed by all the gold or foreign exchange reserves and all assets of the institution of issue. This absolute inseparability is, after all, merely the expression of the global and "mechanistic" fashion in which the monetary phenomenon itself operates.*

(33) In the world monetary system as it exists today, *currency has value only through the existence of its gold backing, and it would be futile to try, in the succession of States, to dissociate a currency from its backing.* For that reason it is essential that the successor State, exercising its jurisdiction in a territory in which there is inevitably paper money in circulation, should receive in gold and foreign exchange the equivalent of the backing for such issue. The Special Rapporteur would point out, however, that this does not always happen in practice.

(34) The principle of allocation or assignment of monetary tokens to the territory to which the succession of States relates is essential here. If currency, gold and foreign exchange reserves, and monetary tokens of all kinds belonging to the predecessor State are *temporarily* or *fortuitously* present in the transferred territory without the predecessor State's having intended to allocate them to that territory, obviously they have *no link or relationship with the territory* and cannot pass to the successor State. The gold owned by the Banque de France which was held in Strasbourg during the Franco-German War of 1870 could not have passed to Germany after Alsace-Lorraine was annexed to that country had it not been established that that gold had been "allocated" to the transferred territory.

(35) 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.[45]

(36) 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[46] 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.

(37) With the demise of the old Tsarist empire after the First World War, some of its territories passed to Estonia, Latvia, Lithuania and Poland.[47] 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.[48] The provisions of some of these instruments indicated that Russia *released* the States concerned from the relevant portion of the debt, as if this was a derogation by treaty from a principle of automatic succession to that debt. Other provisions even gave the reason for such a derogation, namely, the destruction suffered by those countires during the war.[49]

At the same time and in the 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.

2. *State funds*

(38) State public funds in the transferred territory should 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 link with 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. If they were situated in the territory affected by the change of sovereignty and were *allocated* to that territory, State funds, whether liquid or invested, pass to the successor State. The principle of allocation or assignment is decisive in this case, since it is obvious that funds of the predecessor State which are in transit through the territory in question or are temporarily or fortuitously present in that territory do not 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.[50]

(39) 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",[51] 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"

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[45] 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).

[46] English text in India, *Foreign Policy of India, Texts of Documents, 1947–1964* (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.

[47] 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.

[48] 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).

[49] Cf. B. Nolde, "La Monnaie en droit international public," *Recueil des Cours de l'Académie de droit international de La Haye, 1929-II* (Paris, Hachette, 1930), vol. 27, p. 295.

[50] 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.

[51] "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 succession des Etats (1932–1953)* (Paris, Domat-Monchrestien, 1954), p. 104.

by Czechoslovakia in the territory taken over by Hungary. It is true that these cases, which are cited by writers, lack relevance because they involve forced transfers of territory.

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

3. *State archives*

(41) State archives, jealously preserved, are the essential instrument for the administration of a community. They both record the management of State affairs and enable it to be carried on, while at the same time embodying the ins and outs of human history; consequently, they are of value to both the researcher and the administrator. Secret or public, they constitute a heritage and a public property which the State generally makes sure is inalienable and imprescriptible. Espionage is often nothing but a paper war which enables the more successful to obtain the enemy's—or even the ally's—plans, designs, documents, secret treaties, and so forth. The destructive hatchet and torch of wars, which have eternally afflicted mankind, have seriously impaired the integrity of archival collections. The documents are sometimes of such importance that the victor hastens to remove these valuable sources of information to its own territory. Armed conflict may result not only in the occupation of a territory, but also in the plundering of its records.

(42) The Second World War, more than any other conflict, was concerned with this problem of archives. The Hitlerite régime played havoc with archives, for instance in Moravia, in the Sudetenland. The victors of 1945 gave extra attention to the question of archives and confiscated those in the possession of the Third Reich, wherever they were, the better to ascertain and pin-point Hitlerite responsibility. Some of these archives were later returned to the post-war German Government.[52] The peace treaties reflected the concern of the Allies that the important problem of archives should not be ignored, and it was found possible to include in those agreements a number of provisions which will be discussed later.

(43) Where State succession is concerned, this matter has been regulated by treaty in quite considerable detail. It is only in rare cases that the instrument setting the seal on the understanding between the two parties simply provides that arrangements for the handing over of documents, deeds and archives will be agreed on by the competent authorities of the parties.[53] Even less frequently does the agreement merely legalize the *status quo*, each party retaining the archives which are in its possession.[54] Treaties relating to changes of sovereignty over a territory are, on the contrary, usually more specific in regulating this problem.

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

(a) *Definition of items affected by the transfer*

(45) The items involved are *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.

(46) The phrase "archives and documents" is understood 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. In the context of the proposed article, the reference will obviously be to State archives. Practice has shown, however, that 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.

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.

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

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

[54] See, for example, the agreement between France and Viet-Nam concluded by an exchange of letters dated 8 March 1949, sect. VI ("Cultural questions"), subsection "Archives" (France, Présidence du Conseil, Secrétariat général du Gouvernement et Ministère de la France d'outre-mer, Direction des affaires politiques, *La documentation française* (Paris, 20 June 1949), No. 1147, p. 7).

Lastly, it is necessary to cover all *varieties* of documents. The wordings used in diplomatic instruments include "archives, registers, plans, title-deeds and documents of every kind";[55] "archives, documents and registers concerning the civil, military and judicial administration of the ceded territories";[56] "all title-deeds, plans, cadastral and other registers and papers";[57] and so on.

One of the most detailed definitions of the term "archives" that the Special Rapporteur has come across is the one in article 2 of the Agreement of 23 December 1950 between Italy and Yugoslavia, concluded pursuant to the Treaty of Peace of 10 February 1947. It encompasses not only State papers but also documents relating to all the public services, to the various parts of the population, and to categories of property, situations or private juridical relations.[58] The Special Rapporteur mentions it here by way of illustration, even though the draft article submitted to the Commission for its consideration is limited to the case of State archives.

(*b*) *The principle of the transfer of archives to the successor State*

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

(48) This principle originated long ago in territorial transfers carried out in the Middle Ages. France and Poland provide examples of them.[59] In France, King Philippe Auguste founded in 1194 his *Trésor des Chartes,* in which he assembled the documents relating to his kingdom. In 1271 Philippe III (the Bold), upon inheriting the estates of his uncle, Alphonse de Poitiers (almost the whole of southern France), had the archives immediately incorporated into the *Trésor*: title-deeds to the estates, cartularies, registers of letters, surveys and administrative accounts. This was the practice followed over the centuries, as the Crown acquired new lands. The same practice was followed in Poland, from the fourteenth century onwards, as the kingdom gradually became unified through the absorption of the ducal provinces: the archives of the dukes were transferred to the king at the same time as the duchy.

Thus the principle of transfer has been applied for a very long period, although, as will be seen, the reason invoked has varied.

(49) If the central State archives are an indivisible entity, the predecessor State and the successor State will agree to reproduce them in the most suitable way and to apportion them between themselves according to such procedures as they may choose. One example not to be emulated is that provided by the Treaty of Turin of 16 March 1816[60] between the Kingdom of Sardinia and the Swiss Confederation establishing the frontiers of Savoy and the State of Geneva: they went so far as to tear books apart or cut pages out of common land registers with scissors in order to give each of the parties its due.[61] Nowadays, of course, the solution to problems of this kind is greatly facilitated by the existence of sophisticated modern techniques of document reproduction.

(50) The principle of the transfer of archives concerning the part of territory ceded is itself justified by the application of two basic principles: (*a*) the *principle of territorial origin* or of the *territoriality of archives*, according to which all papers and documents originating in the territory to which the succession of States relates must pass to the successor State, and (*b*) the *principle of pertinence*, according to which papers concerning the territory in question, irrespective of where they are kept, are likewise handed over.

(i) *Archives of every kind*

(51) *Archives of every kind are generally handed over to the successor State immediately or within a very short time-*

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[55] This expression appears in several clauses of the Treaty of Versailles of 28 June 1919, e.g., part III, sec. I, article 38, concerning Germany and Belgium, and sect. V, article 52, concerning Germany and France in respect of Alsace-Lorraine; (*British and Foreign State Papers* (London, H.M. Stationery Office, 1922), vol. 112, pp. 29–30 and 42), in the Treaty of Saint-Germain-en-Laye of 10 September 1919, in article 93, concerning Austria (*ibid.*, p. 361), and in the Treaty of Trianon of 4 June 1920 in article 77, concerning Hungary (*ibid.*, vol. 113, p. 518).

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

[57] Article 8 of the Additional Agreement to the Treaty of Peace, signed at Frankfurt on 11 December 1871 (provision relating to the cession of Alsace-Lorraine) (*ibid.*, 1875, vol. XX, p. 854).

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

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

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

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

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

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

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

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

[59] France, Direction des archives de France, *Actes de la sixième Conférence internationale de la Table ronde des archives, Les archives dans le vie internationale* (Paris, Imprimerie nationale, 1963), pp. 12 *et seq.*

[60] Treaty between H.M. the King of Sardinia, the Swiss Confederation and the Canton of Geneva (G. F. de Martens, ed., *Nouveau Recueil de traités* (Göttingen, Dieterich, 1880) vol. IV (1808–1819) (reprint), p. 214).

[61] France, *Les archives dans la vie internationale* (*op. cit.*), p. 20.

limit. It is sufficient that these archives *relate directly* to the territory affected by the succession of States, that is to say, that they should have a *direct link, administrative or historical,* with that territory.

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.[62] 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.[63] 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.[64] Under the terms of an identically worded provision of the same Treaty, the German Government contracted the same obligation towards Belgium.[65] Without any change in wording, other international instruments, namely, the Treaty of Saint-Germain-en-Laye and the Treaty of Trianon, imposed on Austria and Hungary respectively, the same obligation towards the successor States.[66]

(ii) *Archives as an instrument of evidence*

(52) 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".[67]

(iii) *Archives as an instrument of administration*

(53) The obligation to hand over as viable a territory as possible has the compelling force of a simple idea and 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 ceded is properly governable. Hence the obligation to leave in the territory all the written, graphic and photographic material needed for the continuance of its administrative functioning.

For instance, when the provinces of Jämtland, Härjedalen, Gottland and Ösel were ceded, the Treaty of Brömsebro of 13 August 1645 between Sweden and Denmark made obligatory the transfer to the Queen of Sweden of all instruments, registers and cadastral documents relating to justice (article 29) as well as any information relating to the fiscal situation of the ceded provinces. Similar stipulations were incorporated by the two Powers in their subsequent peace treaties of Roskilde (26 February 1658) (article 10) and Copenhagen (27 May 1660) (article 14).[68]

Article 69 of the Treaty of Munster of 30 January 1648 between the Netherlands and Spain provided that "all registers, maps, letters, archives and papers, together with all documents relating to lawsuits, *concerning** any of the United Provinces, associated countries, towns ... located in courts, chancelleries, councils and chambers, shall be handed over ..."[69]

In the Treaty of Utrecht of 11 April 1713, Louis XIV ceded to the States General (of the Netherlands) Luxembourg, Namur and Charleroi "with all the papers, letters, documents and archives *concerning** the said Netherlands".[70]

(54) Most treaties concerning succession in respect of part of territory contain a clause relating to the transfer of the archives; thus it is impossible to list them all. The treaties are sometimes even supplemented by a special convention relating solely to that point. Thus, following on the peace treaties which ended the First World War, the Convention between Hungary and Romania, signed at Bucharest on 16 April 1924,[71] relates to the exchange of legal documents, land registers and registers of civil status, and specifies the manner in which the transfer is to be effected.

(55) Where there is more than one successor State, each taking over a portion of territory of the predecessor State, which does not, however, cease to exist, special solutions have been adopted to deal with the archives. These examples are old and isolated and cannot be considered to constitute a custom, but the Special Rapporteur felt that they were worth mentioning because modern reproduction methods would make the solution of the problem very simple nowadays.

The Barrier Treaty of 15 November 1715, concluded between the Holy Roman Empire, England and Holland provided in article 18 that the archives of the dismembered territory, Gelderland, would not be divided among the three successor States but would remain intact and that an inventory would be drawn up and a copy given to each of the three parties, which would be able to consult the documents freely.[72]

Similarly, article VII of the Treaty concluded between Prussia and Saxony on 18 May 1815[73] mentions "deeds and papers which ... are of common interest to the two parties". The solution chosen was that Saxony would keep the originals and be responsible for giving Prussia certified copies.

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[62] Article 3 of the Treaty of Peace of 10 May 1871 (see foot-note 56 above).

[63] Article 8 of the Additional Agreement of 11 December 1871 (see foot-note 57 above).

[64] Article 52 of the Treaty of Versailles of 28 June 1919, part III, sect. V (Alsace-Lorraine), article 52 (see foot-note 55 above).

[65] Article 38 of the Treaty of Versailles (*ibid.*).

[66] Article 93 of the Treaty of Saint-Germain-en-Laye of 10 September 1919 (see foot-note 55 above) and article 77 of the Treaty of Trianon of 4 June 1920 (*ibid.*).

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

[68] France, *Les archives dans la vie internationale* (*op. cit.*), p. 16.

[69] *Ibid.*

[70] *Ibid.*, p. 17.

[71] League of Nations, *Treaty Series,* vol. XLV, p. 331.

[72] France, *Les archives dans la vie internationale* (*op. cit.*), p. 17.

[73] G. F. de Martens, ed., *Nouveau Recueil de traités* (Göttingen, Dieterich, 1818), vol. II, p. 276.

(56) Thus, in accordance with the principle of respect for collections, which arose from the desire to facilitate administrative continuity, the entire collection of archives remained intact, whatever the number of successors. However, that same principle and desire will lead to numerous contestations when applied today, owing to the distinction that has arisen between administrative and historical archives.

(iv) *Historical component of archives*

(57) The practice of States as it emerges from an analysis of old treaties of annexation, especially in Europe, has sometimes led the predecessor State to consider itself entitled to hand over only archives of an administrative character[74] and to retain those which had a historical interest. However, such instances seem to be rather isolated ones and often become questionable with the passage of time.

The Agreement between France and India of 21 October 1954 concerning the future of the French Establishments in India[75] makes this distinction between types of archives.[76] Article 33 of the Agreement provides as follows:

> 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.[77]

(58) For the sake of clarity in the discussion, it should be borne in mind that what is involved is not the predecessor State's entire historical archives but only, of course, those relating to the transferred territory. Thus, the case mentioned above obviously concerns not France's historical archives but those of a similar nature relating to the former "French Establishments in India".

(59) The Special Rapporteur looked in vain for other similar diplomatic precedents; it seems clear that the predecessor State's retaining the historical archives of the territory is not justified, and that this does not reflect either a rule or a custom. It is no doubt one of those isolated cases which are probably due to special circumstances. Of course, if the succession of States relates to an insignificant extent of territory of the predecessor State, which has no historical archives, the problem does not arise.

(60) The examples cited below are evidence, on the contrary, of the actual transfer of archives, including historical documents. In some cases, however, the transfer took place after much delay. 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[78] the historical archives at Turin.[79] Similarly, 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.[80] It would be easy to find many more examples relating to this point.

(61) The Treaty of Vienna of 3 October 1866 by which Austria ceded Venetia to Italy provided in article 18 for the handing over to Italy of all "title-deeds, administrative and judicial documents ... *political and historical documents of the former Republic of Venice**", while each of the two parties pledged to let the other copy "*historical and political** documents that might concern the territories remaining in the possession of the other Power and which, in the interests of knowledge, cannot be taken from the archives to which they belong".[81]

Again, the Peace Treaty between Finland and Russia signed at Dorpat on 14 October 1920 specifies in article 29, paragraph 1, that

> The Contracting Powers undertake at the first opportunity to restore the archives and documents which belong to public authorities and institutions which may be within their respective territories, and which refer entirely or mainly to the other Contracting Power or its history.*[82]

(62) Obviously, the successor State cannot claim simply any archives, but only those which belong to the territory. The organic link between the territory and the archives relating to it is what must be taken into account.[83] However, a difficulty arises when the strength of this link has to be gauged for each 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".[84] The "archives-territory" link was specifically taken into account in the Rome Agreement of 23 December 1950 between Yugoslavia and Italy concerning archives, cited above.[85]

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

[75] For reference, see foot-note 46 above.

[76] This involved a case of decolonization by integration with a State other than the colonial State, which, as has been noted, is to be assimilated to succession in respect of part of territory.

[77] A similar provision already appeared in article VI of the Treaty of cession of the territory of the Free Town of Chandernagore signed in 1951 between India and France (for reference, see above, foot-note 37).

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

[79] The agreements of 1860 relating to the cession of Nice and Savoy were supplemented by the provisions of the Treaty of Peace with Italy of 10 February 1947, article 7 of which required the Italian Government to 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".

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

[81] France, *Les archives dans la vie internationale* (*op. cit.*), p. 27.

[82] League of Nations, *Treaty Series*, vol. III, p. 72.

[83] Under article 11, para. 1, of the Treaty of Peace of 10 February 1947 (for reference, see foot-note 80 above), Hungary handed over to the successor States, Czechoslovakia and Yugoslavia, objects "constituting [their] cultural heritage ... which *originated in those territories** ...".

[84] 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.

[85] Article 6 of the Agreement (see foot-note 58 above) provides that archives which are indivisible or of common interest to both parties

> "shall be assigned to that Party which, in the Commission's judgement, is more interested in the possession of the documents in question, *according to the extent of the territory or the number of*

(*Continued on next page.*)

63. 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.[86]

64. 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".[87]

65. Even though it has a different application, we could cite in support of the principle of the transfer of archives the following resolution of the General Conference of UNESCO:

The General Conference Recognizing the role of mass media in all aspects of human development, in fostering international understanding and as an instrument for the acceleration of social development,

Recommends to Member States

...

(*d*) to co-operate in the return of original manuscripts and documents, or, if this is not possible for special reasons, of copies of them, to the countries of origin.[88]

The logic and form of the language can only be interpreted to mean that the expression "country of origin" denotes the territory concerned by the archives, that is to say, the successor State in the event that there has been a succession of States.

Article 13. Succession in respect of part of territory as regards State property situated outside the territory concerned

When territory under the sovereignty or administration of a State becomes part of another State,[89] [movable or immovable] property of the predecessor State situated outside the territory to which the succession of States relates shall, unless otherwise agreed or decided:

(*a*) remain the property of the predecessor State;

(*b*) pass to the successor State if it is established that the property in question has a direct and necessary link with the territory to which the succession of States relates; or

(*c*) be apportioned equitably between the predecessor State and the successor State if it is established that the territory to which the succession of States relates contributed to the creation of such property.

Commentary

(1) The Special Rapporteur recalls that succession of States relates only to property of the predecessor State and not to property owned by the detached part of the territory in its own right. The latter property, which falls outside the scope of draft article 13, may be situated either in the territory of the predecessor State or in that of a third State.

The case of property proper to the detached territory which is situated in the predecessor State is clear: this is 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. The occurrence of State succession does not transfer the right of ownership of property of this kind, which remains within the patrimony of the ceded or detached territory. It cannot suddenly, merely because of the succession of States, become the property of the predecessor State, even if it is situated in the part of territory remaining to that State after curtailment. Since the predecessor State did not own this property before the succession of States, it cannot, merely because of the succession, create new rights for itself. This is so *a fortiori* when such property proper to the detached territory is in the territory of a third State.

(2) The scope of draft article 13 therefore extends only to property of the predecessor State. The article complements draft article 12 in that it refers to State property situated, in this case, outside the territory to which the succession of States relates. The problem in connexion with draft article 13 is whether, as a result of the succession of States, the successor State possesses, outside its sphere of territorial jurisdiction, some right to property of the predecessor State. The correct answer to this question can only be in the negative. Unless otherwise agreed, the predecessor State naturally retains ownership of all its property situated either in the part of territory remaining to it after curtailment or in the territory of a third State. This is the answer clearly given by subparagraph (*a*) of draft article 13.

(3) But subparagraphs (*b*) and (*c*) nevertheless envisage the possibility of assigning the ownership of all or some of that State property to the successor State, according as the property has a direct and necessary link with the detached territory or was created with a contribution from that terri-

(*Foot-note 85 continued.*)

*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."

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

"Communal property 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).

[87] 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.

[88] UNESCO, *Records of the General Conference, Sixteenth Session, Resolutions* (Paris, 1970), p. 89, resolution 9.134.

[89] *Variant:* **"When part of the territory of a State, or when any territory, not being part of the territory of a State, for the international relations of which that State is responsible, becomes part of the territory of another State . . .".**

tory. The provisions of these subparagraphs, which constitute exceptions to the principle formulated in subparagraph (*a*), are based on considerations of equity. If, because of its movable nature, State property has been removed from the territory to which the succession relates even though it has a direct and necessary link with that territory, subparagraph (*b*) enables it to be duly returned to the territory. However, subparagraph (*b*) can apply equally well to an item of immovable property, although such cases will be less frequent. Subparagraph (*c*) can apply either to movable or to immovable property. The principle of equity embodied in this subparagraph allows account to be taken of various factors of apportionment, particularly the respective contributions of the predecessor State and of the territory which has been detached from it.

(4) A review of State practice will shed light on the content of these rules. Particular attention will be paid to the case of archives.

ARCHIVES SITUATED OUTSIDE THE DETACHED TERRITORY

(5) Draft article 13, according to the text submitted by the Special Rapporteur for discussion, enables the successor State to claim archives wherever they may be, provided that they concern the detached territory and have a direct link with it.

The Treaties of Paris and Vienna of 1814 and 1815 required the return to the original place of deposit of the State archives which had been concentrated in Paris during the Napoleonic period.[90]

Under the Treaty of Tilsit of 7 July 1807, Prussia, which had returned the part of Polish territory it had conquered, was obliged to hand over to the new Grand Duchy of Warsaw not only the current local or regional archives relating to the returned territory but also the State documents ("Berlin archives") relating to it.[91]

Similarly, Poland recovered the central archives of the former Polish State which had been transferred to Russia at the end of the eighteenth century and those of the former autonomous Kingdom of Poland of 1815–1863 and of its continuation up to 1876. In addition, it received the documents of the Secretariat of State of the Kingdom of Poland, which operated at St. Petersburg as a central Russian department from 1815 to 1863, those of the Tsar's Chancellery for Polish Affairs and the documents from the Office of the Russian Minister of the Interior responsible for land reform in Poland.[92]

Under the Treaty of Vienna of 30 October 1864, Denmark was to cede the three duchies of Schleswig, Holstein and Lauenburg. Article 20 of the Treaty therefore stipulated that "Property titles, administrative documents and civil-justice instruments concerning the territories surrendered and included among the records of the Kingdom of Denmark" were to be handed over, together with "all portions of the Copenhagen records which belonged to the duchies surrendered and have been removed from their archives, . . ."[93]

(6) For the sake of greater precision in considering this State practice (although, as a matter of principle, it is undesirable to attach too much importance to peace treaties, in which solutions are based on a certain "power ratio"), 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.

A. *Archives which have been removed*

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

(8) 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[94] provided as follows:

> If any of these items [archives, documents, registers, etc.] have been removed, they will be restored by the French Government on the demand of the German Government.

This statement of the principle that archives which have been removed must be returned was later incorporated, in the same wording, in article 52 of the Treaty of Versailles,[95] 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.

(9) 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.[96] The Agreement between Italy and Yugoslavia of 23 December 1950 is even more specific: its 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

[90] France, *Les archives dans la vie internationale* (*op. cit.*), pp. 19–20.

[91] *Ibid.*, p. 20.

[92] *Ibid.*, pp. 35–36.

[93] *Ibid.*, pp. 26–27. English text of Treaty in F. L. Israel, ed., *Major Peace Treaties of Modern History, 1648–1967* (New York, Chelsea House Publishers, 1967) vol. I, p. 611.

[94] See G. F. de Martens, ed., *Nouveau Recueil général de traités* (Göttingen, Dieterich, 1874), vol. XIX, p. 689.

[95] Treaty of Versailles, sect. V, article 52, concerning Alsace-Lorraine; see *British and Foreign State Papers, 1919*, vol. 112, p. 42.

[96] 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.

Italian Government shall endeavour to recover it and deliver it to the Yugoslav Government".[97]

(10) 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".[98] 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?[99]

(11) 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**.[100]

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 archives belonging to territories under its control at that time, but to deprive an individual of public archives which were improperly in his possession.[101] 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.

(12) 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 at least to one interpretation of the texts, this practice seems to indicate that only administrative archives should be returned to the territory affected by the change of sovereignty, while historical documents relating to that territory which are situated outside or are removed from it remain the property of the predecessor State. For example, the Treaty of Zurich of 10 November 1859 between France and Austria provided that archives containing titles to property and documents concerning administration and civil justice relating to the territory ceded by Austria to the Emperor of the French "which may be in the archives of the Austrian Empire", including those at Vienna, should be handed over to the commissioners of the new Government of Lombary.[102] 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.[103]

Article 2 of the Treaty of the same date between France and Sardinia[104] refers to the aforementioned provisions of the Treaty of Zurich, while article 15 of the Treaty concluded between Austria, France and Sardinia also on the same date reproduces them word for word.[105]

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 cast in the same mould as the article cited above, which 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.[106]

(13) 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. If

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

[98] F. Despagnet, *Cours de droit international public*, 4th ed. (Paris, 1910), p. 128, para. 99.

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

[100] 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.

[101] 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 which remained French, and this provided a ground for the Court's decision.

[102] Article 15 of the Treaty of Peace between France and Austria, signed at Zurich on 10 November 1859 (France, *Archives diplomatiques, Recueil de diplomatie et d'histoire* (Paris, Aymot, 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).

[103] 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 id., *Le traité de Francfort* (Paris, Berger-Levrault, 1909), p. 269, foot-note 2.

[104] 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).

[105] 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).

[106] 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.

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.[107]

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

*all archives, historical and administrative, prior to 1860, which concern** the territory ceded to France under the Treaty of March 24, 1860, and the Convention of August 23, 1860.[108]

(15) 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.

B. *Archives established outside the territory*

(16) This case involves 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 already noted, France was able to obtain, through the Treaty of Peace with Italy of 1947, sets of archives relating to Savoy and Nice established by the City of Turin.[109]

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

(17) 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 signed in Rome on 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 it and deliver it to the Yugoslav Government".[110]

In other words, to use terms dear to experts in French civil law, this was a matter not so much of "an obligation concerning the result" as of "an obligation concerning the means".

SUB-SECTION 2. NEWLY INDEPENDENT STATES

Article 14. Succession to State property situated in newly independent States

1. Unless otherwise agreed or decided, the newly independent State shall exercise a right of ownership of immovable property which, in the territory which has become independent, was owned on the date of the succession of States by the predecessor State.

2. Movable property of the predecessor State situated, on the date of the succession of States, in the territory which has become independent shall pass to the successor State unless:

(*a*) the two States otherwise agree;

(*b*) such property has no direct and necessary link with the territory, and the predecessor State has claimed ownership thereof within a reasonable period.

3. Nothing in the foregoing provisions shall affect the permanent sovereignty of the newly independent State over its wealth, its natural resources and its economic activities.

COMMENTARY

(1) Draft article 14 deals exclusively with succession to State property situated in newly independent States. It therefore leaves two categories of property outside its scope. The first is that of property proper to the Non-Self-Governing Territory which is about to become a newly independent State. Such property is not affected by the succession of States, firstly because, by definition, it does not belong to the predecessor State, whose property alone is affected by the succession of States, and secondly because it does not in any case qualify as State property, since the Non-Self-Governing Territory does not acquire statehood until the day on which the succession of States occurs. The second category is that of property situated outside the territory of the newly independent State, which will be covered by the provisions of draft article 15.

A. SPECIAL CHARACTERISTICS OF THIS TYPE OF SUCCESSION[111]

(2) Before commenting on the rules contained in the above draft article, it is worth while to recall the special characteristics of this type of succession as compared with

[107] Article 10 of the Convention of 23 August 1860 between France and Sardinia (see foot-note 106 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".

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

[109] See para. (14) above.

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

[111] For further details, see M. Bedjaoui, "Problèmes récents de succession d'Etats dans les Etats nouveaux", *Recueil des cours ... , 1970-II* (Leyden, Sijthoff, 1971), vol. 130, pp. 457–585, and especially pp. 483–502.

others. It involves a "Non-Self-Governing Territory", which means, in accordance with the United Nations Charter, a territory having a certain international status. In contrast to other types of State succession, where until the occurrence of the succession the predecessor State possesses the territory to which the succession of States relates and exercises its sovereignty there, this is a case of a non-self-governing country whose *people* is ethnically different from that inhabiting the "metropolitan country", whose *territory* is juridically distinct from that of the State administering it, and over which the latter State does not exercise *sovereignty*, having only the status of an "administering Power".

(3) The position now, according to General Assembly resolution 2625 (XXV) of 4 November 1970 (Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations), is that

> The territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or Non-Self-Governing Territory have exercised their right of self-determination . . ."

It is on this basis that one can affirm that every non-independent territory has a legal status of its own which is regulated and protected by international law.

(4) Furthermore, it is now accepted that sovereignty in a colony in no case belongs to the "metropolitan country" but belongs to the dependent people. When that people accedes to independence, it exercises its own sovereignty and not that of the administering State, supposedly transmitted to it by the latter. In accordance with General Assembly resolution 1514 (XV), every people, even if it is not politically independent at a certain stage of its history, possesses the attributes of national sovereignty inherent in its existence as a people, and that status and those attributes can cease to exist only if the people concerned is literally destroyed.

(5) Consequently, the State which administers a Non-Self-Governing Territory can only have the status of an "administering Power", involving a set of obligations which the United Nations Charter and the International Court of Justice have defined. This status entitles the State which possesses it to perform administrative acts in the territory, but not acts for the disposal of the territory, its property or the rights of its population.

(6) In the light of the foregoing, the administering Power is clearly the beneficiary of a United Nations trust and must accordingly assume the international obligation not to jeopardize the viablity of a State on the verge of independence by improperly disposing of property which should revert to it or by arrogating to itself, directly or indirectly, its resources of any kind.

(7) In contrast with the situation concerning "succession in respect of part of territory", cases of accession to independence by force still occur. Moreover, it often happens that negotiations to break the bonds of colonial domination begin and end on terms and in circumstances which are distinctly unfavourable to the party acceding to independence, because of the unequal and unbalanced legal and political relationship between the two parties.

(8) At all events, negotiated peaceful settlements are almost the exception here, and the wording of the article should therefore be particularly clear, taking account of the fact that the successor State must enjoy favourable provisions because, as it enters international life, it needs as solid a foundation as possible in order to guarantee its sovereignty and consolidate its independence, and also because the predecessor State will tend not to "play fair" in transferring property.

(9) The general principle is thus that State property situated in the territory which has become independent passes to the successor State.

B. *Succession to immovable property: State practice and judicial decisions*

(10) Paragraph 1 of article 14, as submitted by the Special Rapporteur, regulates the problem of immovable property of the predecessor State situated, on the date of the succession of States, in the territory which has become independent. In accordance with the general principle of State succession (draft article 9, already adopted by the Commission), paragraph 1 of article 14 provides that immovable property of the predecessor State situated in the territory to which the succession relates shall pass to the newly independent State.

This solution is generally accepted in the literature and in State practice, although in neither case is express reference always made to "immovable" property which is "situated in the territory" but rather to property in general, irrespective of its nature or its geographical situation. Thus, if general transfer is the rule, the passing to the successor State of the more limited category of property provided for in article 14, paragraph 1, must *a fortiori* be permitted.

(11) Article 19, first paragraph, of the Declaration of Principles concerning Economic and Financial Co-operation (Evian agreements between France and Algeria of 19 March 1962) provided that

> Public real estate [of the French State] in Algeria will be transferred to the Algerian State . . . .[112]

In fact, all French military real estate and much of the civil real estate (excluding certain property retained by agreement and other property which is still in dispute) has over the years gradually passed to the Algerian State.

(12) A great many bilateral instruments or unilateral enactments of the administering or constituent Power simply record the express relinquishment by the predecessor State without any *quid pro quo*, of all State property or, even more broadly, all public property without distinction situated in the territory to which the succession of States relates.[113]

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[112] United Nations, *Treaty Series*, vol. 507, p. 65.

[113] The Federation of Malaya, later involved in a uniting of States, was initially a case of decolonization to which the United Kingdom applied the principle enunciated above.

See, for example, the Constitution of the Federation of Malaya (1957), which provided that all property and assets in the Federation or one of the colonies which were vested in Her Britannic Majesty should on the date of proclamation of independence vest in the Federation or one of its States. The term used, being general and without restrictions or

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The "draft agreement on transitional measures" of 2 November 1949 between Indonesia and the Netherlands, adopted at the end of the Hague Round-Table Conference (August-November 1949),[114] provided for the devolution of *all* property, and not only immovable property, in the Netherlands public and private domain in Indonesia. A subsequent military agreement transferred to Indonesia, in addition to some warships and military maintenance equipment of the Netherlands fleet in Indonesia, which constituted movable property, all fixed installations and equipment used by the colonial troops.[115]

When the Colony of Cyprus attained independence, all property of the Government of the island (including immovable property) became the property of the Republic of Cyprus.[116]

Libya received "the movable and *immovable** property located in Libya owned by the Italian State, either in its own name or in the name of the Italian administration".[117] In particular, the following property was transferred immediately: "the public property of the State (*demanio pubblico*) and the inalienable property of the State (*patrimonio indisponibile*) in Libya", as well as the public archives and "the property in Libya of the Fascist Party and its organizations".[118]

Burma was to succeed to all property in the public and private domain of the colonial Government,[119] including fixed military assets of the United Kingdom in Burma.[120]

(13) Without the principle of the passing of immovable State property being in any way called in question, the Special Rapporteur has drafted paragraph 1 of article 14, which deals with this principle, in such a way as to allow the successor and predecessor States to depart from it by agreement if they so desire, regard being had to the nature and closeness of the bonds of "co-operation" they may wish to establish between themselves.

This practice has been especially widely followed in the cases of decolonization in French-speaking black Africa.[121] The independence agreements were accompanied by various protocols concerning property, under which the independent State did not succeed to all the property belonging to the predecessor State. It is in France that the strongest legal tradition has sanctioned the distinction between the public domain and the private domain of the State. In the colonies, such distinctions also existed in the case of the property of the colonial State. However, with the arrival of independence, they were in several instances discarded in favour of treaty provisions designed to take into account the military, cultural or other presence of the predecessor State in these countires. In exchange for French co-operation, a limited transfer of public property was agreed upon.

(14) In some cases, the pre-independence *status quo*, with no transfer of property, was provisionally maintained.[122] In others, devolution of the (public and private) domain of the French State was affirmed as a principle but was actually implemented only in the case of property which would not be needed for the operation of the various French military or civilian services.[123] Sometimes the agreement between France and the territory that had become independent clearly transferred all the public and private domain to the successor, which incorporated them in its patrimony but, under the same agreement, retroceded parts of them either in ownership or in usufruct.[124] In some cases the newly

(*Foot-note 113 continued.*)
specifications, authorizes the transfer of all the property, of whatever kind, of the predecessor State. (*Materials on Succession of States* (United Nations publication, Sales No. E/F.68.V.5), pp. 85–86.)

See also the Malaysia Act, 1963, which provides that the property of any of the Borneo States and of Singapore occupied or used by the United Kingdom in those States shall vest in the Federation (*ibid.*, p. 92).

The same wording was used for the Constitution of the independent State of Western Samoa (1962): "All property ... vested in Her Majesty ... or in the Crown ... shall ... vest in Western Samoa" (*ibid.*, p. 117).

When the town of Tangier was returned to Morocco, the new independent State recovered all its own property and succeeded to all that of the International Administration:

> The Moroccan State, which recovers possession of the public and private domain entrusted to the International Administration ... receives the latter's property ... (Final Declaration of the International Conference in Tangier, and annexed Protocol, signed at Tangier on 29 October 1956, article 2 of the Protocol) (United Nations, *Treaty Series*, vol. 263, p. 171).

[114] *Ibid.*, vol. 69, p. 266.

[115] *Ibid.*, p. 288.

[116] Treaty concerning the establishment of the Republic of Cyprus, signed at Nicosia on 16 August 1960, with annexes, schedules, maps, etc. (United Nations, *Treaty Series*, vol. 382), annex E, section 1 and *passim*.

[117] United Nations General Assembly resolution 388 (V) of 15 December 1950, entitled "economic and financial provisions relating to Libya", article 1.

[118] *Ibid.* The inalienable property of the State is defined in articles 822–828 of the Italian Civil Code and includes, in particular, mines, quarries, forests, barracks (i.e., immovable property), arms, munitions, etc. (i.e. movable property).

[119] Government of Burma Act, 1935.

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

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

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

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

[124] A typical example is the public property Agreement between France and Mauritania of 10 May 1963 (Decree No. 63-1077 of 26

(*Continued on next page.*)

independent State agreed to a division of property between France and itself, but the criterion for this division is not apparent except in the broader context of the requirements of technical assistance and of the French presence.[125] Lastly, there have been cases where a treaty discarded the distinctions between public and private domains, of the territory or of the metropolitan country, and provided for a division which would satisfy "respective needs", as defined by the two States in various co-operation agreements:

> The Contracting Parties agree to replace the property settlement based on the nature of the appurtenances by *a global settlement based on equity and satisfying their respective needs**.[126]

(15) The case of French-speaking black Africa was the one most readily accessible to the Special Rapporteur.[127] However, he doubts whether it was unique in the history of decolonization and whether roughly similar cases are not to be found in the demise of other colonial empires.

(16) In any event, it seems to the Special Rapporteur that the only conclusion he can draw from the foregoing cases is that they involve treaty provisions illustrating the freedom given to States to depart by agreement from a customary rule which would otherwise be definite.[128] However, apart from the quite relevant question of the validity of an agreement concluded on unequal terms[129] and the limited manner in which the agreements concluded between the predecessor State and the successor State effected the partial transfer of immovable State property, these instruments were generally unable to survive for long the more balanced evolution of the political relations between the predecessor State and the newly independent State. Thus, after periods of varying length and varying degrees of "restlessness", in many cases the successor State in French-speaking Africa finally obtained the passing to it of the immovable State property situated in its territory.

C. *Succession to movable property*

(17) Paragraph 2 of draft article 14 concerns the conditions under which *movable property* passes to the newly independent State. In this article, as in others submitted by the Special Rapporteur, the problem of movable property remains the most difficult to solve because of the mobility of the property. Yet such property not only exists but may have a sizeable patrimonial content, so that it would be inconceivable to ignore it on the ground that its mobility would enable it to be placed beyond the reach of any rule that might be established.

(18) The problem of movable property seems to be particularly weighty and accentuated in cases of decolonization. History teaches that at all times and in all places a colonial country does not withdraw from a dependent territory without inflicting much damage on it, for instance by removing a great deal of property and wealth which should revert to the territory. Immovable property does, of course, resist such removal because of its fixed nature, although there are cases where legislation or measures of alienation taken during the *"période suspecte"* enable the colonial country to whittle down the immovable patrimony which is to be left behind. None the less, the favourite area of operations for impoverishing the patrimony of a territory which is about to become independent is still that of movable property.

Man and freedom being what they are, freedom must always be wrested away and is seldom granted, whether at the individual or at the social group level. The tensions created by this quest for freedom are all the more difficult to avoid in that, as Spinoza put it, "every being tends to persist in its being". For these and other reasons, it is hardly to be expected that the transfer of property, and in particular movable property, will in practice be carried out fully in accordance with the canons of justice, morality and law.[130]

(19) Some difficulties seem to have arisen in the succession of the Comoros to the property of the predecessor State. At all events, the Comorian Government issued an Ordinance

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(Foot-note 124 continued.)
October 1963) (France, *Journal officiel de la République française, Lois et décrets* (Paris, 31 October 1963), 95th year, No. 256, pp. 9707–9708). Article 1 permanently transfers the public domain and the private domain. Article 2 grants ownership of certain public property needed for the French Services. Article 3 retrocedes to France the ownership of military premises used for residential purposes. Article 4 states that France may freely dispose of "installations needed for the performance of the defence mission entrusted to the French military forces" under a defence agreement.

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

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

[127] The Special Rapporteur quoted earlier (see para. (11) above) part of the first paragraph of article 19 of the Declaration of Principles concerning Economic and Financial Co-operation between France and Algeria (for reference, see above, foot-note 112).

> "Public real estate [of the French State] in Algeria will be transferred to the Algerian State, *except, with the agreement of the Algerian authorities**, for the premises deemed essential to the normal functioning of temporary or permanent French services."

This is a further example of an agreement which limits the transfer of property.

[128] Madeleine Grawitz wrote in connexion with the decolonization of Libya:

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

Her terminology, however, lacks precision.

[129] Cf. M. Bedjaoui, *loc. cit.*, pp. 487–488.

[130] See *Yearbook ... 1971*, vol. II (Part One), p. 185, document A/CN.4/247 and Add.1, foot-note 149.

concerning its succession to that property.[131] The introductory *exposé des motifs* to this Ordinance, issued in Moroni, is interesting to examine from the point of view of the theory of the succession of States by decolonization, in that it clearly sanctions the total and immediate transfer of all movable and immovable property to the successor State. The *exposé des motifs* states:

> In acceding to independence, the Comoros replaces the former administering Power. This means that *all** administrative *resources** of that Power *in service** in the Comoros henceforth belong to the Comorian State and that the French State shall retain in our territory no property other than that the use of which we leave to it.

In fact, article 1 of the Ordinance provides that

> All movable and immovable property belonging to the government services of the former administering Power shall, as from the declaration of independence, be the property of the Comorian State.

However, the Ordinance is a penal instrument. The *exposé des motifs* states that "in order to forestall any irresponsible individual action on either the French or the Comorian side, the Executive Council must ensure that property for which it is responsible is not stolen or destroyed". Article 3 therefore provides penalties of imprisonment and fines for the following offences:

> Theft of material of any kind connected with the functioning of administrative and technical services: office equipment, vehicles, files, documents, electronic devices, maintenance equipment, tools, etc.;
> The substitution of obsolete equipment for equipment currently in use;
> The sabotage of such equipment.

Article 4 of the Ordinance empowers the customs authorities, with the assistance of the security services, to "examine packages and luggage leaving each island in order to determine that no government property is illegally exported".

(20) Apparently, some of the difficulties encountered on the date of the succession of States in the Comoros were created by the transfer of all kinds of property from the islands of the Archipelago to the island of Mayotte, which remained French.[132]

[131] Ordinance No. 75-14/CEN of 26 November 1975 "for the prevention and punishment of certain offences against the administrative and technical property of the Comorian State", with an introductory *exposé des motifs*, signed by the President of the National Council, Mr. Said Mohammed Jaffar. See Comores, *Journal officiel d'Etat Comorien*, (Antananarivo), 1 December 1975, 15th year, No. 396, p. 434.

[132] However, in an article entitled "Comoro Overkill", *The New York Times* of 15 January 1976 criticized France's attitude to the Comoros, comparing it to the French attitude towards Guinea at the time of its accession to independence, and stating:

> "When Sékou Touré's Guinea in 1958 became the only one of France's African colonies to reject General de Gaulle's offer of a French 'community' of African States—choosing full independence instead—the French leader reacted in anger. He ordered all French administrators, teachers, doctors and technicians out of Guinea. Before leaving, they destroyed documents, ripped out telephones, smashed light bulbs and stripped the police of uniforms and weapons.
>
> No telephones, light bulbs or police uniforms were reported removed from the Comoro Islands in December when the last French technicians and experts suddenly left France's former Indian Ocean colony, after cutting off budgetary and other financial support. But, in other respects, the abrupt withdrawal—leaving most of the Islands' 320,000 people threatened by bankruptcy, famine and the breakdown of essential services—was reminiscent of the Guinean precedent."

D. *Property proper to the Non-Self-Governing Territory*

(21) It should of course be noted that article 14, like all the texts submitted by the Special Rapporteur, applies to property, movable or immovable, of the *predecessor State*. It is obvious, that for example, movable property which belonged *as of right* to the Non-Self-Governing Territory is not affected by the succession of States. It will be the indisputable property of the newly independent State.

(22) Paragraph 2 (*b*) of the article appears to leave to the predecessor State the ownership of such property as paintings, works of art, and a country's whole stock of museological or cultural material, since it cannot be said that a painting, for example, has a "direct and necessary link with the territory".

(23) Actually, however, that is not the problem. Property of this kind can fall into only two categories. Either it belonged to the Non-Self-Governing Territory, which acquired it with its own funds or in some other way, in which case it is not affected by the succession of States: the Non-Self-Governing Territory cannot be dispossessed of such property merely because it becomes a newly independent State, any more than it should be dispossessed of it merely because the property happens to be in the so-called "metropolitan" territory. Or, alternatively, it belonged to the predecessor State, and as such it is genuine State property but in this case it is rarely situated in the territory acceding to independence. Since such property is usually and normally situated in the territory of the predecessor State, its presence in the newly independent State can only be fortuitous or temporary (e.g., an inter-museum loan or exchange for the duration of an exhibition, or for the protection in an overseas territory of works of art which the "metropolitan" country, at war with a neighbouring State, is afraid of losing). In this case, such State property, which has "no direct and necessary link with the territory" in which it happens to be, cannot pass to the successor State. However, the predecessor State must claim it within a reasonable period. Such a requirement seems logical in order to avoid awkward or uncertain situations and to encourage their speedy clarification.

E. *Succession in respect of currency*

(24) Let us consider first of all the question of the *privilege of issue* and recall that is does not relate directly to succession of States. This privilege, which is a regalian right and an attribute of public authority, must belong as of right to the new sovereign in the territory to which the succession of States relates, or, in other words, to the newly independent State. By its nature, it cannot be the subject of a succession or a transfer. The predecessor State loses its privilege of issue in the Non-Self-Governing Territory and the newly independent State exercises its own privilege of issue, which it derives from its sovereignty. Just as the successor State does not derive its sovereignty from the predecessor State, so also it does not receive from the predecessor State an attribute of sovereignty such as the privilege of issue.

(25) There have, however, 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.

(26) 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 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 CFA franc issued by the Banque Centrale des Etats d'Afrique équatoriale ... shall remain the lawful currency being legal tender throughout their territories.[133]

(27) 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 linked to the French Treasury. The West African Monetary Union, composed of Ivory Coast, Senegal, the Upper Volta, the Niger, Dahomey [Benin] and Togo,[134] has a common currency, the CFA (Communauté financière africaine) franc, issued by the Banque Centrale des Etats de l'Afrique de l'Ouest, 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, 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 Madagascar each have their own banks of issue.

(28) The peculiarity of these four banks, which issue a CFA franc that has no "international personality" and has an absolutely fixed rate of exchange with the French franc, 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 the 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.[135]

(29) The fact that these monetary agreements are currently 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.

(30) 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,[136] or to giving some other name to the Spanish peso without changing its value or the structure of the currency.[137]

(31) 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.

(32) Ethiopia and Libya apparently did not succeed to the

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[133] 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, p. 6612) includes an article 1 recognizing 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.

Cf. 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. 6634); 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. 1048); 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).

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

[135] 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.

[136] 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.

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

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.

(33) In pursuance of the decisions taken at the Conference on Indo-China held at Pau from 30 June to 27 November 1950, a bank for Indo-China 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 Indo-China but would circulate as legal tender throughout those States.

(34) 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[138] 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 India and Pakistan had been taken into account for the purpose of this apportionment. Pakistan's actual share came to 17.5 per cent.

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

(36) We may also eliminate another question which, like the privilege of issue, does not relate directly to succession of States. This is the question of *monetary tokens proper to the Non-Self-Governing Territory*. In the present debate, the Commission and the Special Rapporteur should confine themselves to the question of State property, which means property of the predecessor State, thus excluding property proper to the Non-Self-Governing Territory. 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 metropolitan 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. 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.

(37) It is necessary, therefore, to concentrate exclusively on the general, factual situation which can be observed on the date of the succession of States in a territory which has become independent: at that time there is a currency in circulation—this is an observable fact. If the currency was issued by an institution of issue proper to the territory, independence will not change the situation. However, if the currency was issued for the territory by and under the responsibility of a "metropolitan" institution of issue, it must be backed by gold and reserves if it is to be kept in circulation. Geneviève Burdeau writes:

> Determination of the total amount of currency to be shared ... is based on the idea that the entire assets of the institution of issue shown under the heading "backing for the issue" guarantee all currency issued by the institution in the interest of the country as a whole.[141]

(38) The monetary tokens in question must, however, be ones that were placed in circulation or stored by the predecessor State in the territory which has become independent and were allocated by it to that territory. Consideration must be given to cases where the monetary gold of the predecessor State may be in the dependent territory only *temporarily or fortuitously*—for example, where as a result of an armed conflict the colonial Power had thought to safeguard its gold reserves by placing them in a territory which at the time was still one of its dependencies. All the gold of the Banque de France was thus evacuated to West Africa during the Second World War. Obviously, in such circumstances the gold and foreign exchange reserves stored in the territory had not been *allocated* to the territory. The "movable property" in question had no direct and necessary link with the territory which had become independent, and could not therefore be transferred to the newly independent State in accordance with paragraph 2 (*b*) of draft article 14.

F. *Succession in respect of Treasury and public funds*

(39) Here again, the Special Rapporteur leaves aside the question of a Treasury and of funds which are proper to the Non-Self-Governing Territory, since it does not relate to the succession of States. 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

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

[139] 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).

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

[141] G. Burdeau, "Les successions de systèmes monétaires en droit international" (Paris, 1974) (thesis, Paris II, mimeographed), p. 276.

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 which has become independent.

(40) It is necessary, therefore, to concentrate exclusively on the Treasury and funds of the predecessor State situated in the Non-Self-Governing Territory. Furthermore, these assets must have been allocated to and destined for the territory in question by the predecessor State if they are to pass to the newly independent State in accordance with article 14, paragraph 2 (*b*). Here, too, the principle of allocation and destination of the property is basic and decisive. If funds, holdings or assets of the Treasury of the predecessor State should be provisionally or fortuitously in the Non-Self-Governing Territory, they remain the property of the predecessor State.

(41) It appears 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 of transfer to the newly independent State, 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.

(42) 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 which 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.

(43) On termination of the French Mandate, Syria and Lebanon succeeded jointly to the "common interests" assets, including "common interests" Treasury funds and the profits derived by the two States from various concessions. The two countries succeeded to the assets of the Banque de Syrie et du Liban. However, most of these assets were blocked and were released only progressively over a period extending to 1958.[142]

(44) 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.[143]

G. *Succession in respect of State archives and libraries*

(45) Applied to the problem of archives, article 14 permits the transfer to the newly independent State of all archives of the predecessor State that are in the territory to which the succession of States relates. However, the article leaves aside three categories of archives. First, there are those which belonged as of right to the Non-Self-Governing Territory, before or during its colonization. They naturally become the archives of the newly independent State, without regard to any question of State succession. However, where they are situated at the time when the succession of States occurs is of decisive importance. Belonging incontestably to the Non-Self-Governing Territory, which acquired them with its own funds or in any other way or which assembled them throughout its history, the archives should revert to the newly independent State if they are still in its territory at the time of its succession to independence, or be claimed by it if they have been transferred out of the territory by the predecessor State. Here again, one encounters the difficulties inherent in the mobility of some kinds of property, such as archives, whose improper removal from the territory raises the whole problem of recovering them. This problem will be encountered yet again in connexion with draft article 15. In any case, however, this is property belonging to the Non-Self-Governing Territory which is becoming independent, without regard to any question of State succession.

(46) Then there is a second category of archives not covered by the present article, namely, archives of the predecessor State which may be situated, for one reason or another, in the Non-Self-Governing Territory without having any "direct and necessary link" with it. According to the wording of paragraph 2 (*b*) of article 14, the predecessor State can obtain restitution of such archives if it so requests within a reasonable period, should it have overlooked any of them when withdrawing from the territory.

(47) Lastly, there is a third category of archives, comprising any papers and documents which fulfil three conditions: they are situated outside the Non-Self-Governing Territory (usually in the territory of the predecessor State); they actually belong to the predecessor State, but they relate by their subject-matter to the history or the life of the Non-Self-Governing Territory. The Special Rapporteur refrains for the time being from commenting on what should happen to such items, but will have occasion to discuss that point when dealing with draft article 15 concerning property situated outside the Non-Self-Governing Territory.

(48) Having thus sketched out the "fringes" of article 14, one can affirm that, on the basis of the rule which it enunciates, the newly independent State is obviously entitled to retain any archives which are in its territory, unless it is

[142] For Syria, see the Convention on Winding-up Operations, the Convention on Settlement of Debt-claims and the Payments Agreement, all three dated 7 February 1949 (France, *Journal officiel de la République français, 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).

[143] 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.

clear that they were stored there fortuitously and temporarily by the predecessor State and that they have no link with the territory. Understood in this way, the rule provides what is, after all, a very meagre result where archives are concerned; for it is trivial to observe that archives belong to the successor State—if it finds them in its territory. The rule as enunciated does not solve what constitutes the very essence of the problem in such a case. The question is what happens in precisely those cases where the predecessor State does not leave these archives, or leaves only a part of them, in the territory to which the succession of States relates. Here we encounter the twofold problem of archives which have been removed or established outside the territory and which relate to the Non-Self-Governing Territory.

Article 14 therefore needs to be supplemented by an additional rule, which will be found in article 15 relating to property situated outside the territory acceding to independence. Once again, we encounter the special problem of the mobility of some kinds of property.

(49) Article 14, paragraph 2, does not in the final analysis pose any particular difficulty in connexion with archives, and its scope in relation to that specific subject is relatively limited. The problems will emerge rather in connexion with article 15. There is no need, therefore, to prolong the present commentary, inasmuch as it seems evident that the archives of a territory, situated in that territory, belong to the newly independent State. The Special Rapporteur will, however, take this occasion to furnish some information on the practice of States.

(50) The problem raised by the attribution of archives relating to Non-Self-Governing Territories is wholly contemporary. In the past, the colonial Powers scarcely considered the question when ceding or abandoning one of their territories. There were two possibilities. Either the archives remained in the territory and shared its destiny. Such was the case of the local archives of the Spanish possessions in America. The new States of Latin America therefore had at their disposal a nucleus for constituting their own collections. Or else, as happened most frequently, the colonial Power repatriated the archives either by force or by agreement. Thus Spain, having ceded Louisiana to France in 1802, immediately repatriated all the archives and agreed to hand over to France only papers "relating to the limits and demarcation of the territory".[144]

Similarly, in 1864 Great Britain authorized the Ionian Islands to unite with Greece and transferred all the archives to London.[145]

France at an early stage practised a particular form of repatriation of archives: a royal edict of 1776 set up the *Dépôt des papiers publics des colonies,* which was to receive every year, at Versailles, copies of papers of court record-offices, notaries' records, registers of births, marriages and deaths, and so forth.[146] It still exists today but now only receives the registers of births, marriages and deaths.

(51) Many examples could be given; not until the period following the Second World War, with decolonization, was an attempt made to find a uniform solution with regard to the devolution of archives. Decolonization revived the problem of archives and posed it in different terms, since until that time the question had always related to the passing of a territory from one sovereignty to another already constituted sovereignty, whereas it then became a question of a territory obtaining or recovering its own sovereignty.

(52) Although it seems that there should be no doubt concerning the principle, no satisfactory solution has yet been reached concerning this question. This may be explained in part by the diversity of situations: variety of local conditions, of the preceding status and of the degree of administrative organization left by the colonial Power in the territory.

(53) The attribution of archives therefore seems to have been decided case by case, naturally on the basis of the degree of importance of the documents for the newly independent territory and for the former metropolitan country, but especially on the basis of the "ratio of power". It is stated in the publication of the French Direction des archives already quoted that:

> It appears undeniable that the metropolitan country should hand over to States that achieve independence in the first place *the archives which antedate the colonial régime,** which are without question the property of the territory. It also has the duty to hand over *all documents which make it possible to ensure the continuity of administrative activity and to preserve the interests of the local population** ... As a result, the titles to property of the State and of semi-public institutions, documents concerning public buildings, railways, public highways, cadastral documents, census results, local registers of births, marriages and deaths, etc., shall normally be handed over with the territory itself. This supposes the regular handing over of the local administrative archives to the new authorities. It is regrettable that the conditions in which the passing of power from one authority to another occurred did not always make it possible to ensure the regularity of this handing over of archives, which may be considered indispensable.[147]

H. *Permanent sovereignty of States over their natural resources and wealth and over their economic activities (the economic content of the concept of sovereignty)*

(54) Paragraph 3 of draft article 14 specifies that "Nothing in the foregoing provisions shall affect the permanent sovereignty of the newly independent State over its wealth, its natural resources and its economic activities." The point here is that the rules relating to succession of States which the International Law Commission is to formulate should take into account the general context of decolonization and the reappraisal which is under way of the relations between industrialized and developing countries.

(55) While it is essentially true that, in contemporary international law, agreement continues to form the basis for relations between States,[148] and while it is only natural to

[144] France, *"Les archives dans la vie internationale", op. cit.,* pp. 41–42. However, when France in turn sold Louisiana to the United States, the Franco-American Treaty of 30 April 1803 provided for the handing over of "archives, papers, and documents relating to the lands *and to sovereignty" (ibid.).*

[145] *Ibid.,* p. 42.

[146] Carlo Laroche: "Les archives françaises d'outre-mer", *Comptes-rendus mensuels des séances de l'Académie des sciences d'outre-mer,* vol. XXVI, meeting of 18 March 1966 (pp. 122–149), pp. 124–125.

[147] France, *"Les archives dans la vie internationale", op. cit.,* pp. 43–44.

[148] Cf. Ch. Chaumont, "Cours général de droit international public", *Recueil des cours ..., 1970-I* (Leiden, Sijthoff, 1971), vol. 129, pp. 415 *et seq.*

provide, as the Special Rapporteur has so far done in each of his draft articles, that predecessor and successor States may, by agreement, reach whatever settlement they choose on the question of State property, it is no less certain, firstly, that in the case of all types of succession of States there is a general presumption of the transfer of State property to the successor State, and, secondly, that in the case of decolonization there is in addition a general context which is increasingly incompatible with any limitations imposed by treaty on the rule of the total transfer of State property.

(56) This general context includes, firstly, the increasingly strong affirmation of the permanent sovereignty of States over their natural resources. For more than a quarter of a century, the United Nations has been concerned with this problem and has refined the content of this "inalienable right of each State".[149] Resolution 1737 (LIV) of the United Nations Economic and Social Council, of 4 May 1973, whose implications for the very concept of sovereignty will be discussed below, even declares that

*an intrinsic condition** of the exercise of the sovereignty of every State is that its sovereignty be exercised fully and effectively over all its natural resources.

The same resolution repeats the affirmation, which has become a regular feature of all resolutions of the General Assembly and the Economic and Social Council on the subject, that

any act, measure or legislative provision which one State may apply against another for the purpose of suppressing its inalienable right to the exercise of its full sovereignty over its natural resources ... or of using coercion to obtain advantages of any other kind, is a flagrant violation of the Charter of the United Nations, contradicts the principles adopted by the General Assembly in its resolutions 2625 (XXV) and 3016 (XXVII) ..., and that to persist therein could constitute a threat to international peace and security.

(57) The most recent resolution of the Economic and Social Council on this question (resolution 1956 (LIX), of 25 July 1975)

*Strongly** reaffirms the *inalienable** right of States to exercise *full permanent** sovereignty over *all** their *wealth, natural resources and economic activities**.

One could hardly state this principle in stronger or more comprehensive terms.

(58) General Assembly resolution 2625 (XXV) of 24 October 1970, containing the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, specifies that

No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind.

(59) The formulation of a Charter of Economic Rights and Duties of States under the auspices of the United Nations Conference on Trade and Development[150] looms large among the recent developments within the United Nations system in the matter of permanent sovereignty over natural resources. This Charter, which was adopted by the General Assembly in its resolution 3281 (XXIX) of 12 December 1974, should, according to the resolution,

constitute an effective instrument towards the establishment of a new system of international economic relations based on equity, sovereign equality and interdependence of the interests of developed and developing countries.

(60) The fifteen fundamental principles which, according to this Charter (chapter I), should govern economic as well as political relations among States include the

Remedying of injustices which have been brought about by force and which *deprive a nation of the natural means necessary for its normal development**.

State property is certainly one of those "necessary natural means".

(61) Article 2 of this Charter (para. 1) states that

Every State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities.

Expanding on the passage from the resolution quoted above, article 16 states in its paragraph 1 that:

It is the right and duty of all States, individually and collectively, to eliminate colonialism, ... neo-colonialism ... and the economic and social consequences thereof, as *a prerequisite for development**. States which practise such coercive policies are economically responsible to the countries, territories and peoples affected for the *restitution** and full compensation for the exploitation and depletion of, and damages to, *the natural and all other resources** of those countries, territories and peoples. It is the duty of all States to extend assistance to them.

(62) The General Assembly, meeting in a special session for the first time in the history of the United Nations to discuss economic problems following the "energy crisis", gave due prominence to the "full permanent sovereignty of every State over its natural resources and all economic activities" in its Declaration on the Establishment of a New International Economic Order (resolution 3201 (S-VI), of 1 May 1974). In section VIII of its Programme of Action on the establishment of that new international economic order (resolution 3202 (S-VI), of 1 May 1974), the Assembly states that all efforts should be made

*To defeat attempts** to prevent the free and effective exercise of the rights of every State to full and permanent sovereignty over its natural resources.

(63) All these rules of conduct are already clearly incompatible with any "agreements" restricting the nature and scope of the transfer of the property of the predecessor State to the newly independent State, especially as article 25 —like article 16 mentioned above—of the Charter of Economic Rights and Duties of States actually asks the predecessor State not only to transfer to the new State the property to which it is entitled but also to give it additional assistance:

... the international community, especially its developed members, shall pay special attention to the particular needs and problems of the least developed among the developing countries, of land-locked developing countries and also island developing countries, *with a view to helping them to overcome their particular difficulties** and thus contribute to their economic and social development.

[149] Cf. General Assembly resolutions 626 (VII) of 21 December 1951, 1803 (XVII) of 14 December 1962, 2158 (XXI) of 25 November 1966, 2386 (XXIII) of 19 November 1968 and 2692 (XXV) of 11 December 1970.

[150] See *Proceedings of the United Nations Conference on Trade and Development, Third Session*, vol. I, *Report and annexes* (United Nations publication, Sales No. E.73.II.D.4), annex I.A, resolution 45 (III).

(64) Referring to what he has called the "ideology of sovereignty over natural resources", one author writes:

> Sovereignty over natural resources does not constitute a special category; it appears separate only because of the unfortunate wording which is used in this connexion. Reference is made to "sovereignty *over* natural resources" ... but in fact it would be better to speak of sovereignty *in respect* of natural resources, which are not an additional title of sovereignty but simply one object among many providing the State with an opportunity to exercise its sovereignty: natural resources are situated within State territory; like all persons and things in the same situation, they provide an occasion for the exercise of territorial jurisdiction ...
>
> One cannot be sovereign "in respect of wealth", any more than one can be an owner "in respect of property".

And the author considers that this "ideology", because of the "intoxication of sovereignty" which it produces, presages a precarious future for the world, "unstable legal situations" and an "anomy of States' decision-making power".[151]

(65) The fact of the matter is that it is in the nature of neo-colonialism and imperialism to try to thwart any effective expression of the sovereignty of newly independent States anxious to achieve their full development. The set of relationships established between the former colonial Power and the former dependent territory, the introduction of "forced bilateralism", as Gunnar Myrdal calls it, and the more or less formal and nominal replacement of the relationship of domination by so-called "special" or "preferential" ties are in reality conducive to the alienation of political and economic sovereignty, internally and externally. Complete sovereignty can be promoted only through a long struggle against the scourges of colonialism, neo-colonialism and imperialism, which succeed each other at various stages in the evolution of newly independent States, paralysing their development by ways and means that are constantly being diversified. And when the underdeveloped countries exercise their sovereign rights over their wealth or their property, or merely aspire to do so, they are criticized for a "dangerous excess of sovereignty" or for making anachronistic use of sovereignty at a time when—it is said—interdependence should be the keynote.

(66) Fictitious political independence and actual economic subordination unfortunately remain the most striking characteristics of the situation of many third world countries, permitting neo-colonialism to keep them in a state of underdevelopment. Showing through the artificiality of the legal and institutional structures created in order to give an appearance of national sovereignty are elements of real dependence, based on organized economic subordination, which is patently incompatible with the *true concept of sovereignty*. This sham sovereignty makes independence a superficial phenomenon beneath which the old forms of dependence survive and economic empires prosper.

(67) Ritually recited, the litany of formal sovereignty, learnt only too well from classical law, will contribute to the maintenance of institutional mirages at the expense of development *until such time as a modern concept of sovereignty, incorporating the dimension of economic independence, has been evolved.* Without such an enrichment of international law, which the newly independent States expect, national emblems may be only apparent attributes of sovereignty, under the cloak of which powerful economic freemasonries will continue to dictate their will with impunity.

(68) Just as individuals are equal before the law in a national society, so all States are said to be equal before the international "rules of the game". But in spite of this theoretical equality, flagrant inequalities remain, both between individuals and between States, so long as sovereignty—a system of reference—is not accompanied by economic independence. When the elementary bases of national economic independence do not exist, it is sheer fraud to talk about the principle of the sovereign equality of States.

(69) In addition, the concept of sovereignty is not immutable. Traditional sovereignty, evolved in the nineteenth century by and for the European Powers which dominated the world scene, had no economic connotations. That was the era of the surfeited liberal State, with the subject peoples forming a colonial constellation. In that dichotomic world of subjects and objects of international law, of those who took and those who were taken from, sovereignty was defined exclusively in political and institutional terms.

But such a definition seems singularly inappropriate in today's world. It is inappropriate because of its inability to reflect the necessary relationship between its legal form and its social and economic content. This is precisely why there is an obvious gap between the principle of respect for State sovereignty and its real application. This is also why a neo-colonialist offensive by a dominant State against an underdeveloped country can be waged without formal violation of any of the constituent elements of sovereignty, if the classical concept of sovereignty alone is taken into consideration. The tremendous risks involved are obvious.

(70) If, therefore, the principle of sovereign equality of States is to be really purged of its large element of illusion, it will be necessary to find *a new formulation of this principle capable of restoring to the State the elementary bases of its national economic independence. To this end, the principle of economic independence, invested with a new and vital legal function and thus elevated to the status of a principle of contemporary international law,* must be reflected in particular in the right of peoples to dispose of their natural resources, the prohibition of all forms of unwarranted intervention in the economic affairs of States, and the outlawing of the use of force and of any form of coercion in economic and commercial relations.

(71) It is because international law and international relations are to this day organized to serve the development of dominant States that the economic independence and development of other nations has now become a burning international problem: combating underdevelopment necessitates the legal and structural remaking of the world order. The Charter of the United Nations made underdevelopment and economic backwardness problems of direct concern to the international community. But a great distance separates this affirmation of the principle of

[151] Jean Combacau, "La crise de l'énergie au regard du droit international", in Société française pour le droit international, *La crise de l'énergie et le droit international* (Colloque de Caen (May 1975)) (Paris, Pédone, 1976), pp. 17–31.

economic co-operation among States from its embodiment in specific rules of international law. Tremendous efforts will be necessary to establish rules on this subject, so that the Charter can be made "operational" and the principle of sovereign equality of States can be fully implemented.

(72) In this connexion, a tribute must be paid to the efforts made by the United Nations General Assembly to remedy certain shortcomings in the Charter, where the concept of sovereignty was defined by its political elements to the exclusion of its economic aspects and where, in accordance with this approach, sanctions were envisaged for violation only of the political obligations of States, to the exclusion of their economic duties.

(73) The Charter explicitly condemns only infringements of the *political sovereignty* of States. It is to the credit of the General Assembly that, for the first time in the history of international law, it defined in its important resolution 2131 (XX) of 21 December 1965 some of the types of foreign intervention which undermine the *economic independence* of States. A more systematic formulation is required of the prohibition of all economic measures of pressure, coercion or intimidation enacted by one State against another.

(74) General Assembly resolution 1514 (XV) of 14 December 1960, which did not neglect the right of peoples to dispose of their natural resources, and, more particularly, resolution 1803 (XVII) and other subsequent resolutions which affirmed the principle of the permanent sovereignty of States over their natural resources,[152] provide the basis for appraising the efforts of the General Assembly to make a legal reality of this fundamental aspect of the *principle of economic independence* and to rectify the intolerable fact that today most States of the third world are not "developing countries", as they are called, *but underdeveloping countries*. It is alarming to witness among those countries a development of underdevelopment, for various reasons for which the affluent nations are primarily responsible.

(75) It is by reference to these principles that an appraisal should be made of the validity of so-called "co-operation" or "devolution" agreements and of all bilateral instruments which, under the pretext of establishing "special" or "preferential" ties between the new States and the former colonial Powers, impose on the former excessive conditions which are ruinous to their economies. The validity of treaty relations of this kind should be measured by the degree to which they respect the principles of political self-determination and economic independence. Any agreements which violate these principles should be void *ab initio*, without its even being necessary to wait until the new State is in a position formally to denounce their unfair character. Their invalidity should derive intrinsically from contemporary international law and not simply from their subsequent denunciation.

In addition, a thorough scrutiny of the *rebus sic stantibus* clause should enable any State to release itself from its contractual obligations when its political and economic future is at stake.

(76) The inclusion in the Vienna Convention on the Law of Treaties of various provisions concerning the invalidity of agreements concluded under the effect of coercion is also a great achievement which should be applauded and welcomed.

The Declaration on the prohibition of military, political or economic coercion in the conclusion of treaties, included in the Final Act of the United Nations Conference on the Law of Treaties,[153] is fully in line with General Assembly resolution 2131 (XX), which prohibits unwarranted foreign intervention in the economic affairs of States. All this foreshadows the formulation of a coherent set of more complete rules concerning the invalidity of certain agreements, in order to preserve the real content of the independence and sovereignty of States in general and of newly independent States in particular.

Article 15. Succession to State property situated outside the territory of the newly independent State

Property of the predecessor State which is situated outside the territory of the newly independent State shall remain the property of the predecessor State unless:

(*a*) the two States otherwise agree; or

(*b*) it is established that the territory which has become independent contributed to the creation of such property, in which case it shall succeed thereto in the proportion determined by its contribution; or

(*c*) in the case of movable property, it is established that its being situated outside the territory of the newly independent State is fortuitous or temporary and that it has in fact a direct and necessary link with that territory.

Commentary

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

(1) Here, as elsewhere, the Special Rapporteur does not cover the case of property of a Non-Self-Governing Territory which has acceded to independence, but only that of property of *the predecessor State* situated either in the territory of the predecessor State or in that of a third State, since this is normally the only property affected by a succession of States.

(2) The territory which has become independent may have in what was for it the metropolitan country such property as buildings, administrative premises, rest and recreation facilities or portfolios of securities acquired with its own funds. It may also have owned 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 territory which has become independent cannot, on its own, constitute grounds for making an exception to that obvious principle. Ownership

[152] See above, para. (56) and foot-note 149.

[153] *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. 285.

of such property cannot depend on its geographical location.

(3) A 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 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 acceding to independence 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 territory now detached, using its own funds or those of public agencies under its jurisdiction (e.g., family allowance or social security funds).

(5) The former Belgian 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.[154]

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 sizeable 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.[155] 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.[156] The agreement was approved by Decree of the King of the Belgians on 27 June 1960.[157]

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

(6) Eventually, the Belgian-Congolese agreements of 6 February 1965[158] 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 affected by 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 situated outisde the Congo. A compromise was finally reached on 15 February 1967.

(7) On the occasion of the "disannexation" or "decolonization" of Ethiopia,[159] articles 37 and 75 of the Treaty of Peace of 1947[160] required Italy to restore objects of historical value to Ethiopia, and the Agreement of 5 March 1956 between the two countries[161] 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 situated elsewhere. This was so, for example, in the case of the resolutions of the General Assembly on economic and financial provisions relating to Libya and Eritrea.[162]

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

[155] 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.

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

[157] *Ibid.*

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

[159] 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 a "newly independent State" unless in this case the term "newly" (*nouvellement*) is interpreted as meaning "again" (*à nouveau*)—in other words, as referring to the reversal of an event.

[160] United Nations, *Treaty Series*, vol. 49, pp. 142 and 157

[161] *Ibid.*, vol. 267, p. 189.

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

In fact, however, such provisions do not conflict with the self-evident principle, 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 proper to the territory which has become independent, situated 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 Algerian war of liberation 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.[163] 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 of the day and Mr. Khider, who was removed from office as General Secretary of the party in power but refused to hand over the 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 which are 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.[164] The Algerian liberation movement and its Provisional Government of the day left property to which independent Algeria should normally succeed through its single ruling party and its new Government. From the outset, this property had the status of "national property", according to the statutes of the NLF.

(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 political 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 reverted 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 but which in some respects resembles the case of the Irish funds—to a logical conclusion because Mr. Khider died at Madrid on 4 January 1967, and if the funds are not assigned to the Algerian authorities, to whom they belong, they may become "ownerless property".

B. *Property of the predecessor State*

(14) Subparagraph (*b*) of article 15, as submitted by the Special Rapporteur, relates to a rule for the apportionment of property according to the respective contributions of the predecessor State and of the territory acceding to independence. It may be noted that property to which this rule would apply could perfectly well be considered "property proper to the dependent territory" in the proportion determined by the territory's contribution. The remainder is property of the predecessor State.

(15) Only the category of property of the predecessor State is, in fact, normally affected by succession of States. Article 15 relates to the situation under general law and naturally favours the retention of such property by the predecessor State. Obviously, the independence of an overseas territory cannot have the paradoxical effect of depriving the predecessor State of movable or immovable property which it possesses in the territory of a third State, much less in its metropolitan territory. That is the meaning and scope of the words: "Property of the predecessor State which is situated outside the territory of the newly independent State shall remain the property of the predecessor State".

(16) However, this obvious principle does not of course

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

[164] See below, commentary to article 17, paras. (64) *et seq.*

prevent the predecessor State and the successor State from agreeing on any other arrangement for a particular category of property. Moreover, the Special Rapporteur has allowed for the case where movable property was removed by the predecessor State, either temporarily or permanently, from the territory which has acceded to independence. He has also covered the case where property is situated outside the territory to which the succession of States relates but to whose acquisition that territory contributed. In both cases, the rights of the successor State should not be disregarded.

(17) The solutions advocated in draft article 15 are justified by the practice of States, some examples of which the Special Rapporteur offers below. However, a distinction should be made between cases where the property of the predecessor State is in the territory of that State and those where it is in the territory of a third State.

1. *Property of the predecessor State which is situated in its own territory*

(18) Let us take the case of archives, distinguishing between those which were removed by the predecessor State and those which were established by it in the metropolitan country but which relate to the dependent territory.

(a) *Archives which have been removed*

(19) 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.

(20) 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.

(21) An international conference on archives has expressed the opinion that the principle of transfer may be difficult to apply to archives connected with the *imperium* and *dominium* of the former metropolitan country:

> There have appeared to be legal grounds for distinguishing in the matter of archives between sovereignty collections and administrative collections: the former, concerning essentially the relations between the metropolitan country and its representatives in the territory, whose competence extended to diplomatic, military and high policy matters, fall within the jurisdiction of the metropolitan country *whose history they directly concern.**[165]

(22) Another author expresses the same opinion:

> Emancipation raises a new problem. The right of new States to possess the archives which are indispensable to the defence of their rights, to the fulfilment of their obligations, to the continuity of the administration of the population, remains unquestionable. However, there are other categories of archives kept in a territory, of no immediate practical interest to the successor State, which concern primarily the colonial Power. On closer consideration, such archives are of the same kind as those which, under most circumstances in European history, unquestionably remain the property of the ceding States.[166]

(23) According to this view, the archives connected with *imperium* would absolutely not belong to the territory. This is no doubt an exaggerated point of view in that the exception made to the principle of transfer for archives connected with *imperium* relates less to the principle of belonging than to considerations of expediency and politics: what is involved, of course, is the importance of good relations between the predecessor State and the successor State, and also at times the *viability* of the newly independent State.

In the interest of such relations it may perhaps be advisable to avoid argument on the subject of "political" archives or archives "connected with sovereignty", since they refer to the policy followed by the colonial Power *within* its dependent territory. For example, archives concerning general policy with regard to the territory, or a repressive policy against its liberation movements, are not to be confused with administrative archives or archives concerning the day-to-day management of the territory, but form part of the political archives or archives connected with sovereignty. It is probably unrealistic to expect the predecessor State to hand them over. But the section of the political archives or archives connected with sovereignty which is concerned with policy carried on *outside* the territory and on its behalf by the colonial Power (conclusion of treaties applied to the territory, diplomatic documents concerning the relations between the colonial Power and third States with respect to the territory, and in particular diplomatic documents concerning the delimitation of its frontiers), unquestionably concern *also* (and sometimes even *primarily,* in the event of a dispute or conflict with a third State) the newly independent State.

(24) 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 can certainly be said that, no matter how sound and well-founded the

[165] France, *Les archives dans la vie internationale* (*op. cit.*), p. 44.

[166] C. Laroche, *loc. cit.*, p. 130 (the author was Chief Conservator of the Overseas Section of the French National Archives).

principle of the transfer of archives may be, it would be unreasonable to expect the immediate return of all archives connected with *imperium* and *dominium*. 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.

(25) However, in the case of historical archives proper, antedating colonization, which may have been removed by the former metropolitan country, the principle of transfer should be firmly and immediately applied. These archives, antedating colonization, 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.

(26) Similarly, the removal of administrative documents of all kinds, 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.

(27) 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.

(28) In practice, decolonization has unfortunately not taken all aspects of the problem sufficiently into account. For example Algeria, in the frontier disputes it faced upon gaining its independence, was unable to obtain access to the diplomatic documents held by France relating to the problem during the colonial period. The case mentioned was even more regrettable in that Algeria was also unable to recover its archives which antedated colonization; those archives had been carefully catalogued by the colonial administration and removed by the latter immediately before independence. They comprised what are commonly known as the Arabic collection, the Turkish collection and the Spanish collection. 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.[167]

(29) In another case, France transferred to Viet-Nam the archives established by the Imperial Government before the French conquest together with the archives necessary for the administration of the country,[168] but it retained all the archives connected with its own external and internal sovereignty in diplomatic, military and political matters.[169] France seems to have followed a similar policy with regard to its former dependencies in Africa.

(30) The United Kingdom and Belgium have followed an analogous policy:

> In all cases the local archives of the territories were handed over, with the exception of papers relating to the sovereignty of the metropolitan country alone.[170]

(31) Professor Rousseau, discussing the case of the decolonization of Cambodia, 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).[171]

(32) In the case of the decolonization of Ethiopia, Italy was required to restore archives which had been removed from that country. Article 37 of the 1947 Treaty of Peace with Italy provided that

> "... Italy shall restore all ... archives and objects of historical value belonging to Ethiopia or its nationals and removed from Ethiopia to Italy since October 3, 1935.[172]

(33) In the case of the decolonization of Libya, the transfer of archives was particularly limited. Article I, paragraph 2 (*a*), of General Assembly resolution 388 (V), entitled "Economic and financial provisions relating to Libya", states 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 immediately.

(34) It will have been noted that the examples cited and the solutions advocated by the Special Rapporteur often show how problems relating to archives overlap. Historical archives which antedate colonization are not "property of the predecessor State" but *property proper to the Non-Self-Governing Territory*, which should revert to the newly independent State without regard to any question of State succession. The only reason why the Special Rapporteur had to bring in this question of historical archives proper to the territory is the overlapping which occurs with other categories of archives removed from the territory. However,

[167] Exchange of notes between Algeria and France, which took place at Algiers on 23 December 1966. In April 1975, on the occasion of the visit to Algeria of Mr. Valéry Giscard d'Estaing, President of the French Republic, an additional 155 boxes of Algerian historical archives were returned by the French Government.

[168] Agreement of 15 June 1950 concerning the apportionment of the archives of Indo-China.

[169] C. Laroche, *loc. cit.*, p. 132.

[170] France, *Les archives dans la vie internationale* (*op. cit.*), p. 45.

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

[172] United Nations, *Treaty Series*, vol. 49, p. 142.

these comments should be read in conjunction with those made concerning "property proper to the territory which has become independent".[173]

(35) The Special Rapporteur points out that the question of archives which have been removed is particularly important in this type of succession, given the frequency with which archives are repatriated by the former metropolitan country. The symposium on African archives and history held at Dakar from 1 to 8 October 1965 recognized its importance and therefore made the following recommendation:

> Considering the successive disruptions of the political and administrative structures of African countries, the participants hope that wherever transfers have infringed the principles of the territoriality of archives and the indivisibility of collections, the situation will be remedied by restitution or by other appropriate measures.[174]

(36) UNESCO has also taken action in this field. Its resolution was mentioned earlier.[175] Its intervention is clearly beneficial, coming as it does from the international organization which is concerned more than any other with the preservation of historical and cultural patrimonies and is free of any preoccupation with national pride.

(36) In addition, a Cartographic Seminar of African countries and France recently adopted a recommendation in which it welcomed the statement by the Director of the National Geographic Institute on the *recognition of State sovereignty over all cartographic archives** and proposed that such archives should be transferred to States on request. However, documents relating to frontiers should be handed over simultaneously to the States concerned.[176]

(b) *Archives established outside the territory which has become independent*

(38) The Special Rapporteur has not found any specific information covering 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 280,000 volumes and some 20,000 unpublished manuscripts, constituting the finest treasury of Hinduism in the world. In 1858 this library was transferred to the India Office in Whitehall. After the partition in 1948, the Commonwealth Relations Office assumed responsibility for the library. On 16 May 1955 the two successor States, India and Pakistan, asked the United Kingdom Government to allow them to divide the library on the basis of the percentages (82.5 per cent for India, 17.5 per cent for Pakistan) used in 1947 for dividing all assets between the two Dominions.

The problem would assuredly be quite difficult to solve, since the Government of India Act, 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.

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

(39) In the draft article under consideration, the Special Rapporteur has suggested a subparagraph (*b*) concerning apportionment between the predecessor State and the successor State of property to the creation of which the formerly dependent territory contributed. The subparagraph relates to such State property regardless whether it is situated in the territory of the predecessor State or in that of a third State.

(40) 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",[177] 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 a part of these assets proportionate to their contribution, or were unable to do so, should not cast any doubt on the value and fairness of the suggested rule. The latter seems all the more justified in view of the fact that participation in various intergovernmental bodies of a technical nature is open to dependent territories as such and that problems of the type described above may thus arise.

(41) The Special Rapporteur would, however, stress the fact that he has found no trace of any precedents regarding apportionment of such property between the predecessor State and the newly independent State.

SUB-SECTION 3.

UNITING AND SEPARATION OF STATES

Article 16. Uniting of States

1. On the uniting of two or more States in one State, movable and immovable property situated in the territory of the State thus formed shall remain the property of each constituent State unless:

(*a*) the constituent States have otherwise agreed; or

(*b*) the uniting of States has given rise to a unitary State; or

(*c*) in the case of a union, the property in question has a direct and necessary link with the powers devolving upon the union and it thus appears from the constituent acts or instruments of the union or is otherwise established that retention by each constituent State of the right of ownership of such property would be incompatible with the creation of the union.

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[173] See above, para. (1) *et seq.*

[174] C. Laroche, *loc. cit.*, p. 139.

[175] See above, para. (65) of the commentary to article 12.

[176] Cartographic Seminar of African Countries and France, Paris, 21 May–3 June 1975, *General Report*, recommendation No. 2, "Basic cartography".

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

2. Movable and immovable property situated outside the territory of the State formed by the uniting of two or more States and belonging to the constituent States shall, unless otherwise agreed or decided, become the property of the successor State.

COMMENTARY

A. *Definition and types of uniting of States*

(1) For the purposes of this article, the Special Rapporteur will take for granted the *definition of the uniting of States*, which, according to article 26 of the 1972 draft and article 30 of the 1974 draft on succession in respect of treaties, means "the uniting of two or more States in one State". The commentary on both the aforementioned articles explains that they deal 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".[178]

(2) To render the wording of the article as submitted by the Special Rapporteur less cumbersome, the Commission could, if it so desires, describe the "State formed by the uniting of two or more States" as the *uniting State*, in contrast to the constituent States, which could be called *united States*. In simpler terms, the "uniting" or "constituted" State becomes the *successor State*, while the "united" or "constituent" States are the *predecessor States*.

(3) In paragraph (2) of its commentary on article 26 of the 1972 draft articles on succession of States in respect of treaties (almost identical with paragraph (2) of the commentary to article 30 of the 1974 draft articles on the same subject), the Commission was at pains to point out that it did not matter.

> what may be the particular form of the internal constitutional organization adopted by the successor State. The uniting may lead to a wholly unitary State, to a federation or to any other form of constitutional arrangement. In other words, the degree of separate identity retained by the original States after their uniting, within the constitution of the successor State, is irrelevant for the operation of the provisions set forth in the article.[179]

(4) Where succession to public property in general and to State property in particular is concerned, however, the constitutional form assumed by the uniting successor State is of decisive importance. If the uniting of two or more States results in the creation of a unitary State, the constituent States cease to exist completely, from the standpoint both of international law and of internal public law. All powers inevitably pass to the successor State, and the latter should obviously receive all the property of the constituent States. If, on the other hand, the uniting of States leads to the creation of a confederation or a federation, each constituent State retains, in varying degrees, a certain autonomy, and the new State's constitutional instrument must in any event effect an apportionment of powers, with some matters being assigned to the federal or confederal authorities and others remaining within the jurisdiction of the member States. Such a situation must be taken into account in the context of succession to State property, not all of which can be attributed to the uniting successor State.

(5) The case of a *uniting* of States leading to the formation of a *unitary State* should be carefully distinguished from the case of the *total annexation* of one State by another, which is prohibited by contemporary international law. In times past some authors, in dealing with succession to public property, found it all the easier to confuse the two cases because the solution with regard to the devolution of such property is the same in each. Thus, Bustamante y Sirvén wrote that

> upon the total annexation of one State by another, the property, the rights and the public domain of the State which ceases to exist pass to the successor. They are national assets and cannot remain without an owner because they are necessary to the attainment of State ends.[180]

In that connexion, he makes reference to a draft code submitted to the Institute of International Law in 1934 by Arrigho Cavaglieri, article 4 of which read as follows:

> The *annexing** or *new** State automatically becomes the owner of all property, in both the public domain and the private domain, belonging to the State which has ceased to exist . . .[181]

(6) Apart from the fact that annexation differs from the creation of a unitary State by the uniting of States because it is illegal, it must be pointed out that the two cases are dissimilar in that annexation does not lead to the creation of a *new* State while the uniting of States inevitably does. Thus, when Cavaglieri refers to the "annexing or new State", he is approximating annexation to the uniting of States in a unitary State, or is confusing the two.

B. *Special aspects of succession to property in the case of uniting States*

(7) Where succession to State property in the case of the uniting of States is concerned, the Special Rapporteur suggests that the Commission should depart from the tentative model in articles 30 to 32 of the 1974 draft on succession in respect of treaties and take into account the constitutional organization of the successor State. This is something that complicates, or "enriches", the parameters of the problem to be solved, but it cannot be evaded.

As Fauchille puts it:

> Since the unitary State . . . has ceased to exist, not as a State but only as a unitary State, it should retain its own patrimony: the existence of this patrimony is in fact in no way incompatible with the new regime to which it is subject. There is no reason for attributing to the authorities of the federation or the union . . . ownership of the property of the newly incorporated State: in fact, although this State has lost its original independence it nevertheless to a certain degree retains its legal personality in the political system to which it henceforth belongs.[182]

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[178] *Yearbook . . . 1972*, vol. II, p. 286, document A/8710/Rev.1, chap. II, sect. C, article 26 and para. (1) of the commentary; *Yearbook . . . 1974*, vol. II (Part One), pp. 252–253, document A/9610/Rev.1, chap. II, sect. D, article 30 and para. (1) of the commentary.

[179] *Yearbook . . . 1972*, vol. II, p. 286, document A/8710/Rev. 1, chap. II, sect. C, article 26, para. (2) of the commentary.

[180] A. S. de Bustamante y Sirvén, *Derecho Internacional Público* (La Havana, Carasa, 1936), vol. III, p. 310. vol. III, p. 328.

[181] *Annuaire de l'Institut de droit international, 1934* (Brussels), vol. 38, pp. 477–479.

[182] Fauchille, *op. cit.*, p. 390.

Professor Castrén shares the same opinion:

> Since the members of the union of States retain their statehood, their public property continues as a matter of course to belong to them.[183]

(8) Thus, both international treaty instruments and instruments of internal law, such as constitutions or basic laws, effect and define the uniting of States, stating the degree of integration. It is on the basis of these various expressions of will that the devolution of State property must be determined.

C. *State property in the territory to which the succession of States relates*

1. *Functional criterion for the allocation of property (according to the type of constitutional organization of the successor State)*

(9) The most frequent outcome of the uniting of States in the contemporary world seems to be the creation of a federal or confederal union, rather than a unitary State. The Special Rapporteur therefore felt that he should construct the first paragraph of his article on that basis. Accordingly, the rule which he has enunciated expresses a "fact of non-succession" to the property of the constituent States which form themselves into a federal or confederal union. However, such a rule clearly had to allow for major exceptions, based essentially on the will of the States which have united. Thus, exception (*a*) concerns the material act of agreement between the constituent States, which can freely decide what is to become of their respective property. Exception (*b*), also based on the will of the States or of their peoples (e.g., by referendum), provides for the case in which they decide to create a unitary State, to which all the property of the constituent States must inevitably and logically be transferred. Exception (*c*) relates to the case of a federal or confederal union, the basic case envisaged in the article, but with a reference to the degree of integration of the constituent States in the union which has been created. Once States agree to constitute a union among themselves, it must be presumed that they intend to provide it with the means (including property) necessary for its functioning and viability. That is the simple idea behind this last exception. Property therefore passes to the successor State if it is found to be necessary for the exercise of the powers devolving upon that State under the constituent act of the union. This linkage to the nature and extent of powers seems to be the only logical and sure criterion in this case.

(10) This criterion makes it clear why some items of State property are transferred to the union while others remain the property of each constituent State. Here, as has been noted, it does not matter whether the property is movable or immovable; for it will have been noticed that the proposed article does not provide differential treatment for State property on that basis. What is more to the point is rather the degree of utility of such property, whether movable or immovable, for the attainment of the ends assigned to the union. It will thus be seen that in this particular type of State succession—the uniting of States—there are great differences in the extent to which property is transferred according, first, to the constitutional organization resulting from the uniting and, secondly, to categories of property, the only possible guideline being needs, defined in terms of the purposes of the uniting. From archives to State funds, from Treasury to currency, the differences in devolution are considerable.

(11) Take, for instance, *the case of archives*. If the archives of the constituent 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. In this connexion, an old but significant example may be recalled, that of the *unification of Spain* during the fifteenth and sixteenth centuries. That union was effected in such a way that the individual kingdoms received varying degrees of autonomy, embodied in appropriate organs such as councils and viceroyalties. Consequently, there was no centralization of archives. The present organization of Spanish archives is still profoundly influenced by that system.[184]

(12) 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 but that they must be the subject and the necessary instruments of a unified policy within the union. The union receives the assets of the institution of issue and the gold and foreign exchange reserves 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 State property. The Union receives as its patrimony the State 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. *Old and recent examples of the uniting of States and the attribution of property*

(13) The most notable examples of the uniting of States are old ones, namely, the formation of the United States of America, of the Swiss Confederation, of the German Confederation of 1871, of the Republic of Central America (El Salvador, Honduras, Nicaragua) in 1897 and of the Federation of Central America (Costa Rica, El Salvador, Guatemala and Honduras) in 1921.

(14) There are few recent examples, since many unions have been formed from territories one or more of which were not independent prior to the establishment of the union: the union between Sweden and Norway of 1815, the union between Denmark and Iceland of 1918, the Federation of Malaya of 1957, the Federation of Malaysia of 1963, or the establishment of the Somali Republic in

[183] E. Castrén, "Aspects récents de la succession d'Etats", *Recueil des cours . . . , 1951-I* (Paris, Sirey, 1952), vol. 78, p. 451.

[184] France, *Les archives dans la vie internationale, op. cit.*, p. 13.

1960. Nevertheless, we shall consider these before moving on to examples more directly relevant to the draft article, namely, the uniting of Egypt and Syria in 1958 under the name of the United Arab Republic and of Tanganyika and Zanzibar in 1964 under the name of the United Republic of Tanzania.

(15) As regards succession to property, examples from the older constitutions cannot be considered authoritative, since the issue as it presents itself to contemporary jurists is dealt with only incidentally.

(16) Thus, the only provision relating to public property to be found in the United States Constitution appears in article IV, section 3, which states that

> The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or *other property** belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State.[185]

The Constitution thus gives us no indication of how, and on the basis of what criterion, property was apportioned between the federated States and the federation.

(17) The status of the Swiss Confederation was defined successively by various instruments, the major ones being the Treaty of Alliance of 16 August 1814 between the cantons of the Confederation and the Act of Acceptance of 8 September 1814 annexed thereto, the Constitution of 1848, and the Constitution of 29 May 1874.

The Treaty of Alliance of 1814 contains a provision requiring contributions from the cantons for the purpose of establishing a war fund for the maintenance of federal troops and meeting other expenses of the Confederation. The Treaty lists the contributions payable for that purpose, which differ from canton to canton.[186]

The 1848 Constitution includes an article 33, dealing with postal services, which provides as follows:

> (*d*) The Confederation shall have the right and the obligation to acquire, in return for fair compensation, material belonging to the postal administration, *provided that it is suited to the use for which it is intended and is needed by the administration**.
>
> (*e*) The federal administration shall have the right to utilize buildings at present used for postal purposes, in return for compensation, by purchase or by lease.[187]

The 1874 Constitution contains an article 22, reading as follows:

> In return for fair compensation, the Confederation shall have the right to use or to acquire the ownership of existing parade-grounds and *buildings used for military purposes** in the cantons, and property accessory thereto.
>
> The terms of compensation shall be regulated by federal law.[188]

(18) The tenor of these provisions indicates that succession to public property is not automatic, inasmuch as the States members of a confederation retain a large measure of autonomy. It will have been noted that while in both the Swiss Constitution of 1848 and that of 1874, the principle implicitly expressed is that property remains the property of the cantons, those entities, which together make up the Confederation, may decide otherwise, as they in fact do in those two basic laws of the union, provided that the property in question is suited to the use for which it is intended "and is needed by the administration". Here again we find the essential criterion for the devolution of property which has been identified by the Special Rapporteur.

(19) Similarly, the Constitution of the German Confederation of 1871 contains scattered provisions relating to certain categories of property. Article 41 provides that

> Railways which are considered necessary for the defence of Germany, or for the sake of the common intercourse, may, by virtue of an Imperial law, even against the opposition of the members of the Confederation whose territory is intersected by the railways, *but without prejudice to the prerogatives of the country*, be constructed on account of the empire . . .[189]

Article 53 of the same Constitution states that "the harbour of Kiel and that of Jade are Imperial military harbours".[190] Thus, to meet what would be called "national defence" needs, some property automatically devolves to the Confederation.

Taking these two articles together, it is clear that the principle is to allow each State to retain its territory, its "sovereignty" and its property, although the exigencies of the union may justify the surrender of property by the States to the Confederation.

(20) During the nineteenth and twentieth centuries, the States of Central America attempted several times to unite. The most notable examples are the Republic of Central America, in 1897, and the Federation of Central America, in 1921.

(21) The States constituting the Republic of Central America retained substantial autonomy, to judge from article III of the Treaty of Union of 15 June 1897:

> [They] retain their autonomic system in regard to their internal administration; their union having for its one object the maintenance in its international relations of a single entity in order to guarantee their common independence, rights and due respect.[191]

Accordingly, each State retained its own finances while contributing to common expenses in accordance with article XIII of the Treaty of Union. Among the functions of the President were:

> (*d*) To fix, when necessary, the mode and the resources with which each of the States should contribute to the defence of the territory . . .
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> . . .
>
> (*i*) To fix the amount and the manner in which the States shall share in the common expenses.[192]

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[185] Constitution of 17 September 1787, in A. J. Peaslee, *Constitutions of Nations*, rev. 3rd ed. (The Hague, Nijhoff, 1970), vol. IV, *The Americas*, p. 1204.

[186] G. F. de Martens, ed., *Nouveau recueil de traités* (Göttingen, Dieterich, 1887), vol. II (1814–1815), p. 70.

[187] C. Hilty, *Les Constitutions fédérales de la Suisse* (Neuchâtel, Attinger, 1891), p. 451.

[188] *Ibid.*, p. 443.

[189] English text in *British and Foreign State Papers, 1870–1871*, (London, William Ridgway, 1877), vol. LXI, p. 67.

[190] *Ibid.*, p. 70.

[191] English text in *British and Foreign State Papers, 1899–1900* (London, William Ridgway, 1903), vol. XCII, p. 235.

[192] *Ibid.*, p. 236.

Lastly, each State retained its own responsibilities with regard to currency and finances. Article XXXVII provided that

> The pecuniary or other obligations contracted, or which may be contracted in the future, by any of the States are matters of individual responsibility.[193]

(22) The Treaty of Union of the Federation of Central America of 19 January[194] contains similar provisions. Here for the first time, however, reference is made to a real succession of States in respect of property. Thus, article 5, paragraph (*a*), provides that

> ... The Assembly shall designate and delimit the territory of which [the Federal District] shall consist and shall designate within it the town or place which will be the political capital of the Federation. The State, or States, from whom territory is taken in order to constitute the Federal District, shall cede it forthwith to the Federation without payment.[195]

Article 5, paragraph (*j*), makes provision for succession to movable property:

> The [Federal] Council shall have the free disposal of such armaments and military stores as at present exist in the States, after having provided them with the quantity required for the police forces.[196]

(23) From the constituent instruments of the union between Sweden and Norway of 31 July and 6 August 1815[197] and of the union between Denmark and Iceland of 30 November 1918,[198] the general conclusion may be drawn that each kingdom retained its territory, its sovereignty and the ownership of its property. In any event, these instruments contain no provisions calling for the devolution to the union of the property of the constituent States.

(24) Further information may be derived from an examination of cases where unions were formed from territories one or more of which were not independent prior to the establishment of the union.

(25) The 1957 Constitution of the Federation of Malaya[199] contains a lengthy passage entitled "Succession of property", the most important provisions of which are as follows:

> ... all property and assets which immediately before Merdeka Day [the date of the union] were vested in Her Majesty for the purposes of the Federation or of the colony or Settlement of Malacca or the colony or Settlement of Penang, shall on Merdeka Day vest in the Federation or the State of Malacca or the State of Penang, as the case may be.

The Constitution refers to the criterion of the use of the property concerned for purposes assigned to the union:

> (5) All property and assets which immediately before Merdeka Day were vested in the Federation Government or some other person on its behalf *for purposes which on that day continue to be federal purposes**, shall on that day vest in the Federation.
>
> ...
>
> (7) Property and assets other than land which immediately before Merdeka Day were used by a State *for purposes which on that day become federal purposes** shall on that day vest in the Federation.

It is this same criterion of the allocation and use of the property which allows the States making up the Federation to retain the property they need in order to perform their functions. Paragraph 6 does in fact vest such property in the States.[200]

(26) This rational criterion was again the basis for the apportionment of movable and immovable property between the Federation of Malaysia and the constituent States. The Malaysia Act, 1963, which is the Constitution of Malaysia, provides as follows (section 75, paragraph 3):

> Property and assets other than land which immediately before Malaysia Day [the date of the union] were used by the government of a Borneo State or of Singapore in maintaining government services shall be apportioned between the Federation and the State *with regard to the needs of the Federal and State governments respectively to have the use of the property and assets for Federal or State services**...[201]

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[193] *Ibid.*, p. 238–239.

[194] M. O. Hudson, *International Legislation* (Washington, Carnegie Endowment for International Peace, 1931), vol. I (1919–1921), pp. 600 *et seq.*

[195] *Ibid.*, p. 602.

[196] *Ibid.*, p. 606.

[197] G. F. de Martens, ed., *Nouveau Recueil de traités* (Göttingen, Dieterich, 1887), vol. II, p. 608.

[198] *British and Foreign State Papers, 1917–1918* (London, H.M. Stationery Office, 1921), vol. CXI, p. 703.

[199] United Nations, *Materials on Succession of States* (*op. cit.*), pp. 84 *et seq.*

[200] *Ibid.*, pp. 85–86. The text deserves to be quoted in full:

"*Succession of property*

"166. (1) Subject to the provisions of this Article, all property and assets which immediately before Merdeka Day were vested in Her Majesty for the purposes of the Federation or of the colony or Settlement of Malacca or the colony or Settlement of Penang, shall on Merdeka Day vest in the Federation or the State of Malacca or the State of Penang, as the case may be.

"(2) Any land in the State of Malacca or the State of Penang which immediately before Merdeka Day was vested in Her Majesty shall on that day vest in the State of Malacca or the State of Penang as the case may be.

"(3) Any land vested in the State of Malacca or the State of Penang which immediately before Merdeka Day was occupied or used by the Federation Government or Her Majesty's Government or by any public authority for purposes which in accordance with the provisions of this Constitution become federal purposes shall on and after that day be occupied, used, controlled and managed by the Federal Government or, as the case may be, the said public authority, so long as it is required for federal purposes, and—

"(*a*) shall not be disposed of or used for any purposes other than federal purposes without the consent of the Federal government, and

"(*b*) shall not be used for federal purposes different from the purposes for which it was used immediately before Merdeka Day without the consent of the Government of the State.

"(4) Any State land which, immediately before Merdeka Day, was occupied or used, without being reserved, by the Federation Government for purposes which become federal purposes on that day, shall on that day be reserved for those federal purposes.

"(5) All property and assets which immediately before Merdeka Day were vested in the Federation Government or some other person on its behalf for purposes which on that day continue to be federal purposes, shall on that day vest in the Federation.

"(6) Property and assets which immediately before Merdeka Day were vested in the Federation Government or some person on its behalf for purposes which on that day become purposes of any State shall on that day vest in that State.

"(7) Property and assets other than land which immediately before Merdeka Day were used by a State for purposes which on that day become federal purposes shall on that day vest in the Federation.

"(8) Any property which was, immediately before Merdeka Day, liable to escheat to Her Majesty in respect of the government of Malacca or the government of Penang shall on that day be liable to escheat to the State of Malacca or the State of Penang, as the case may be."

[201] *Ibid.*, pp. 92–93. Sect. 75 reads as follows:

"*Succession to property*

"75. (1) Subject to sections 78 and 79, any land which on Malaysia

(*Continued on next page.*)

(27) Article 4, paragraph 1, of the constituent instrument of the Somali Republic reads as follows:

> All rights lawfully vested in or obligations lawfully incurred by the *independent* Governments of Somaliland and Somalia or by any person on their behalf, shall be deemed to have been transferred to and accepted by the Somali Republic upon the establishment of the Union.[202]

However, inasmuch as there was never an *independent* Government of Somalia, this article in effect makes the Somali Republic the successor of Somaliland only.

(28) The recent examples of the United Arab Republic and the United Republic of Tanzania are more relevant.

(29) The constituent instrument of the United Arab Republic[203] devotes an article (article 69) to succession to treaties, but makes no provision concerning succession to public property. However, in his commentary, E. Cotran gives some interesting information on the United Arab Republic's relations with the International Monetary Fund.[204] The United Arab Republic was never considered by the Fund to be a new member.[205] The Governors simply came to the conclusion, on 16 July 1958 that, as a result of the uniting of Egypt and Syria into a single State, the United Arab Republic constituted one member of the Fund with a single quota. The author also quotes a letter addressed to him on 17 December 1958 by the General Council of IMF stating that the United Arab Republic should be considered to have succeeded to the rights and obligations of Egypt and Syria under the Fund Agreement with a single quota equal to the two former quotas combined. However, as Egypt and Syria were for an interim period to maintain separate currencies and separate monetary reserves, the operations of the Fund would continue to be conducted on a regional basis.[206]

(30) The Constitution of the United Republic of Tanzania,[207] which was formed by the uniting of Tanganyika and Zanzibar on 26 April 1964, contains nothing relating to State succession, except perhaps article 6, which provides, *inter alia*, that:

> ... The said President shall make such provision for the constitution of offices in the service of the United Republic, and *for appointments to such offices** (including appointments by way of transfer of persons who, immediately before Union Day, held office in the service of the Republic of Tanganyika or the People's Republic of Zanzibar) ...[208]

The constitution of the federal offices in question and appointments to them could probably not have taken place without at least some transfer of property from the States of Tanganyika and Zanzibar to the federation.

(31) All the examples cited above lead one to the conclusion that *the question whether the property is movable or immovable has no bearing on the devolution of State property* in the case of this type of succession of States, unlike the others considered previously.

The criterion in the case of a uniting of States has always been: to which party is the property useful and necessary for the exercise of its powers, the constituted or uniting State (successor State) or the constituent or united State (predecessor State)? This is the justification for the wording of paragraph 1 of the article proposed above by the Special Rapporteur.

D. *State property situated outside the territory to which the succession of States relates*

(32) Paragraph 2 of the draft article proceeds from the simple and obvious idea that States, once they agree to unite, cannot fully retain either their internal autonomy or their independence at the international level. If they did, their uniting would lack reality and be practically meaningless. That is why, as a rule, the uniting of States leads either to the creation of a unitary State which, as the successor State, will have sole responsibility for the international relations of the constituent States as a whole or to the creation of a federal or confederal entity whose internal powers may be

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(Foot-note 201 continued.)

> Day is vested in any of the Borneo States or in the State of Singapore, and was on the preceding day occupied or used by the government of the United Kingdom or of the State, or by any public authority other than the government of the State, for purposes which on Malaysia Day become federal purposes, shall on and after that day be occupied, used, controlled and managed by the Federal Government or, as the case may be, the said public authority, so long as it is required for federal purposes; and that land—
>
> "(*a*) shall not be disposed of or used for any purposes other than federal purposes without the consent of the Federal Government; and
>
> "(*b*) shall not by virtue of this sub-section be used for federal purposes different from the purposes for which it was used immediately before Malaysia Day without the consent of the government of the State and, where it ceases to be used for those purposes and that consent is not given, shall be offered to the State accordingly.
>
> "(2) For the purposes of sub-section (1) 'federal purposes' includes the provision of government quarters for the holders of federal office or employment; but that sub-section shall not apply to any land by reason of its having been used by any government for providing government quarters other than those regarded by that government as institutional quarters.
>
> "(3) Property and assets other than land which immediately before Malaysia Day were used by the government of a Borneo State or of Singapore in maintaining government services shall be apportioned between the Federation and the State with regard to the needs of the Federal and State governments respectively to have the use of the property and assets for Federal or State services, and subject to any agreement to the contrary between the governments concerned a corresponding apportionment as at that date shall be made of other assets of the State (but not including land) and of the burden, as between the Federation and the State, of any financial liabilities of the State (including future debt charges in respect of those liabilities); and there shall be made all such transfers and payments as may be necessary to give effect to any apportionment under this sub-section.
>
> "(4) In this section references to the government of a State include the government of the territories comprised therein before Malaysia Day."

[202] E. Cotran, "Legal problems arising out of the formation of the Somali Republic" in *International and Comparative Law Quarterly* (London), vol. 12, July 1963, p. 1016.

[203] English text in E. Cotran, "Some legal aspects of the formation of the United Arab Republic and the United Arab States," *ibid.*, vol. 8, April 1959, pp. 374–387. French text in: France, Présidence du Conseil et Ministère des Affaires étrangères, *La documentation française—Articles et documents* (Paris), 13 March 1958, No. 0.629, Textes du jour: Documents de politique internationale, DCCLXXI.

[204] E. Cotran, "Some legal aspects ..." (*loc. cit.*), pp. 362–363.

[205] IMF, *Annual Report of the Executive Directors for the fiscal year ended April, 30, 1958*, p. 16.

[206] E. Cotran, "Some legal aspects ..." (*loc. cit.*), p. 363.

[207] In A. J. Peaslee, *Constitutions of Nations*, rev. 3rd ed. (The Hague, Nijhoff, 1965), vol. I, *Africa*, pp. 1101 *et seq.*

[208] *Ibid.*, pp. 1103–1104.

shared among, and exercised concurrently by, the member States but whose powers in external affairs usually devolve upon the union or, in other words, upon the successor State.

(33) Practical experience shows that in both these cases, which are the commonest ones, the successor State resulting from the uniting of States is most often vested with responsibility for the international relations of the constituent States. This does not, of course, mean that the constituent States cannot own property abroad. Generally, however, it is the union which then assumes responsibility for such property, because it is best situated to handle transactions and relations of any kind with the rest of the world.

(34) Thus, under the rule enunciated in paragraph 2 of the article, property of the constituent States situated abroad passes to the successor State. This rule is self-evident in the case of a uniting of States which led to the creation of a unitary State. It is also widely observed when the successor State, being organized along federal or confederal lines, assumes sole responsibility for the international relations of the union.

(35) There is no doubt, however, that such a rule is not an absolute one and may quite well be subject to a number of exceptions, not only in cases of the two types of constitutional organization mentioned above but also, and especially, in those where the uniting of States has not affected, externally, the "international personality" of the constituent States. The rule enunciated could not, therefore, be realistic if it did not allow for such exceptions. For that reason, its wording has taken duly into account any treaty provisions to the contrary.

(36) As for practical illustrations of the rule, the Special Rapporteur would recall the example of the United Arab Republic and the International Monetary Fund mentioned above.[209] The respective participations of Syria and Egypt in the Fund were credited to the United Arab Republic, which was considered to be one member of the Fund with a single quota.[210]

(37) On the occasion of the uniting of the Soviet Union and the Baltic States, which became Republics within the Union of Soviet Socialist Republics, some countries, including the United Kingdom and the United States of America, did not recognize this situation and refused to accept the Union of Soviet Socialist Republics as the successor State to the Baltic States with respect to property situated abroad. The Western countries which did not recognize the situation 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,[211] were not recognized as being the property of the successor. The situation was normalized later.

Professor Guggenheim reports the decision of the Swiss Federal Council of 14 November 1946[212]

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.[213]

Article 17. Succession to State property in cases of separation of parts of a State

When a part or parts of the territory of a State separate to form one or more States, whether or not the predecessor State continues to exist:

1. its immovable property shall, except where otherwise specified in treaty provisions, be attributed to the State in whose territory the property is situated;

2. its movable property shall:

(*a*) be attributed to the State with whose territory it has a direct and necessary link, or

(*b*) be apportioned in accordance with the principle of equity among successor States so formed, or among them and the predecessor State if it continues to exist;

3. Movable and immovable property of the predecessor State situated outside the territory of that State shall be apportioned equitably among the successor States and the predecessor State if the latter continues to exist, or otherwise among the successor States only.

COMMENTARY

A. *Definition and types of separation of parts of a State*

(1) Draft article 17 is designed to cover two cases which are quite distinct, at least in theory. First of all, as the counterpart of the preceding article (Uniting of States), it provides for the reverse process, namely, the dissolution of the State thus formed and a return to the situation prior to the uniting of States when the latter has proved a failure. It makes little difference whether the uniting of States resulted in the creation of a unitary State or of a federal or confederal State; what matters is the return to the *status quo ante, through the total elimination of the international personality of the State which resulted from the uniting of States.* However, it may be noted that, historically, dissolutions have not usually involved a unitary State so much as a union of States whose members often had a certain international personality and, in any case, most of the internal State powers.

The article also covers a second case, namely, that in which one or more parts of a State detach themselves from it in order to set up a new State or States. Such a separation

[209] See para. (29) above.

[210] This case also touches on the problem of succession of States in international organizations.

[211] 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.

[212] Switzerland, *Rapport du Conseil fédéral à l'Assemblée fédérale sur sa gestion en 1946*, No. 5231, 1 April 1947, p. 119.

[213] P. Guggenheim, *Traité de droit international public* (Geneva, Georg, 1953), vol. I, p. 466, foot-note 1.

of one or more parts of the territory of a State leaves intact the international personality of the State concerned.

(2) In the 1972 draft articles on succession of States in respect of treaties, the Commission distinguished very clearly between the case of dissolution and that of separation of States.

(3) *Dissolution* occurs, according to the definition given in article 27 of the Commission's 1972 draft, "when a State is dissolved and parts of its territory become individual States" or "where parts of its territory become separate independent States and the original State ceases to exist".[214]

However, one ambiguity should be cleared up. The 1972 draft seems thus to be referring literally to the case of the dissolution of a State, and not to that of the termination of a union, with the consequent risk of reducing the problem under consideration to one of the total dismemberment of a unitary State which breaks up and is replaced in each part of its territory by one of a number of new States. Yet the examples cited at length in the commentary clearly indicate that what is meant is the dissolution of unions.[215] Furthermore, 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".[216]

(4) As regards the definition of *separation*, the Commission associated it also with that of *secession*, by stating in its 1972 draft that it occurs "if part of the territory of a State separates from it and becomes an individual State". Moreover, the commentary to draft article 28, which dealt with that case, specified 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 its existence unchanged except for its diminished territory".[217]

(5) However, this distinction between dissolution and separation was disputed by a number of States in their comments concerning the 1972 draft on succession of States in respect of treaties. The United States of America, for example, pointed out that "the distinction between the dissolution of a State (article 27) and the separation of part of a State (article 28) was quite nebulous. The principal criterion appeared to be that, in dissolution, the predecessor State ceased to exist, while in separation of part of a State, the remaining part continued to be the predecessor State. This differentiation seemed largely nominal."[218]

B. *Special aspects of succession to property in the case of separation*

(6) Nevertheless, the distinction, which does after all have some implications where succession to treaties is concerned, probably has some also in the case of succession to State property. It is not superfluous or irrelevant to know whether the original State ceases or continues to exist, because in the latter case it cannot be deprived of all its property, which is needed for the continued exercise of its essential functions.

(7) Even when the International Law Commission, in its 1974 draft, had to take into account the comments of States which sought some welcome simplification in this highly complex matter, it was obliged, while putting dissolution and separation under the same heading, to single out the case in which the predecessor State continues to exist. Although article 33 of the 1974 draft does not make any distinction, article 34, on the other hand, is concerned with what happens to treaties involving the predecessor State when that State survives the separation.[219]

(8) When the question is studied more thoroughly, however, it is clear that in the last analysis dissolution and separation can be dealt with simultaneously, under a single heading, even in the case of succession to State property. This is so for at least three reasons.

First of all, the distinctive criterion for distinguishing between separation and dissolution being whether or not the predecessor State survives, there is at least one case in which this difference disappears. This is seen to be so when the example of dissolution of a union is compared with the case of total dismemberment of a unitary State, all the parts of the territory of that State setting themselves up as individual States. In both bases—dissolution and dismemberment-separation—the predecessor State disappears.

Secondly, in both dissolution and separation, the basic criterion for the attribution of State property remains, as will be shown, the equitable apportionment of such property among *all* the States concerned, without the status of predecessor or successor ultimately playing a decisive role one way or the other, since equity simply means that each of the States should be viable and should not be deprived of the property which it normally needs. That being so, it seems pointless to try to determine whether the predecessor State has been extinguished or continues to exist. In other words, for the purposes of the attribution of State property, *the predecessor State is in a sense treated as one successor State among all the others*. In the case either of dissolution or of the separation of one or more territories to form one or more States, the property is apportioned impartially among all the recipients or, in other words, among all the States concerned. The problem of succession in respect of State property is in this case simply a matter of apportioning a common patrimony among two or more States, their status, if any, having no effect on the key to apportionment, which is equity.

Thirdly, if in the case of succession to treaties the difference between dissolution, where the predecessor State ceases to exist, and separation, where it may continue to

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[214] *Yearbook ... 1972*, vol. II, p. 292, document A(8710/Rev. 1, chap. II, sect. C, article 1, para. 1, and commentary, para. (1).

[215] The dissolution in 1829–1831 of Great Colombia, formed earlier by the uniting of New Grenada, Venezuela and Quito (Ecuador); the dissolution of the union of Norway and Sweden in 1905; the termination of the Austro-Hungarian Empire in 1919; the breakdown of the union between Denmark and Iceland in 1944; the dissolution of the United Arab Republic and of the Federation of Mali, etc.

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

[217] *Ibid.*, pp. 295–296, article 28, para. 1, and commentary, para. (1).

[218] *Yearbook ... 1974*, vol. II (Part One), p. 69, document A/CN.4/278 and Add.1-6, para. 391. See also the observations of the Special Rapporteur (Sir Francis Vallat) (*ibid.*, p. 70, paras. 394–396).

[219] *Ibid.*, p. 260, document A/9610/Rev. I, chap. II, sect. D.

exist, is deemed to be purely nominal, this difference will certainly be found to be even less significant in the case of succession to State property, where the problem of the existence of a certain international personality of the State is even less relevant than it is in the matter of succession to treaties.

(9) For these reasons, and especially because, for the attribution of property, the solutions are practically identical in the case of dissolution and in that of separation, the Special Rapporteur ultimately decided to combine the two cases in a single article, thus conforming to the final choice made by the Commission for the draft articles on succession in respect of treaties.

C. *Criteria of "equity" and "equitable principles" in the apportionment of property*

(10) A reading of draft article 17 will show that the Special Rapporteur drew basically on the *notion of equity*. Now is perhaps the time to make clear what is meant by that.

(11) Charles de Visscher considered equity to be "an independent and autonomous source of law".[220]

(12) A resolution of the Institute of International Law states:

> (1) ... equity is normally inherent in a sound application of the law;
> (2) ... the international judge can base his decision on equity, without being bound by the applicable law, only if all the parties clearly and expressly authorize him to do so.[221]

In fact, under article 38, paragraph 2, of its Statute, the International Court of Justice may decide a case *ex aequo et bono* only if the parties agree thereto.

(13) The Court has, of course, had occasion to deal with this problem. In the *North Sea Continental Shelf* cases, it sought to establish a distinction between *equity* and *equitable principles*. The Federal Republic of Germany had submitted to the Court, in connexion with the delimitation of the continental shelf, that the "equidistance method" should be rejected, since it "would not lead to an equitable apportionment". The Federal Republic asked the Court to refer to the notion of equity by accepting the "principle that each coastal State *is entitled to a just and equitable share**".[222] Of course, the Federal Republic made a distinction between deciding a case *ex aequo et bono*, which could be done only with the express agreement of the parties, and invoking *equity* as a general principle of law. In its judgment, the Court ruled that positive law, conventional or customary, and in particular the equidistance principle, was not applicable in the cases before it. It is for that reason that the Court recommended the parties to apply the principle of equity in the subsequent negotiations called for by the Federal Republic of Germany.

(14) The Court stated:

> ... it is not a question of applying *equity** simply as a matter of abstract justice, but of applying a *rule of law** which itself requires the application of *equitable principles**, in accordance with the ideas which have always underlain the development of the legal régime of the continental shelf in this field.[223]

In the view of the Court, "equitable principles" are "actual rules of law" founded on "very general precepts of justice and good faith".[224] These "equitable principles" are distinct from "equity" viewed "as a matter of abstract justice". The decisions of a court of justice

> must by definition be *just**, and *therefore** in that sense *equitable**. Nevertheless, when mention is made of a court dispensing justice or declaring the law, what is meant is that the decision finds its objective justification in considerations lying *not outside but within the rules**, and in this field it is precisely *a rule of law** that calls for the application of *equitable principles**[225]

(15) In cases of State succession, the apportionment of State property among the successor States and the predecessor State, if the latter continues to exist, or, if not, among the successor States alone, should be effected by agreement among the parties. In the opinion of the Special Rapporteur such agreement should be based both on "equitable principles" and on "equity" as those terms were defined, if only somewhat approximately, by the Court.

(16) Paragraphs 92 and 93 of the judgment of the Court give a fairly good indication of the direction in which to look. One need only replace the words "determination" or "delimitation of the continental shelf" by the words "apportionment of State property":

> ... it is a truism to say that the determination must be equitable; rather is the problem above all one of defining the means whereby the delimitation can be carried out in such a way as to be recognized as equitable ... it would ... be insufficient simply to rely on the rule of equity without giving some degree of indication as to the possible ways in which it might be applied in the present case ...
>
> In fact, there is no legal limit to the considerations which States may take account of for the purpose of making sure that they apply equitable procedures, and *more often than not it is the balancing-up of all such considerations that will produce this result** rather than reliance on one to the exclusion of all others. The problem of the relative weight to be accorded to different considerations *naturally varies with the circumstances of the case.**[226]

The predecessor State and the successor States could usefully be guided by these observations of the Court when seeking agreement on the apportionment of property.

D. *Solutions proposed in draft article 17*

(17) With regard to the wording of the article, it was thought necessary to differentiate once again between movable and immovable property. As will be shown, the solutions adopted both in the literature and in practice are different in the two cases.

It is worth pointing out that the property involved in succession is State property belonging to the predecessor State. Succession therefore excludes property proper to each of the States of which the Union was composed before its dissolution.

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[220] *Annuaire de l'Institut de droit international, 1934* (Brussels), vol. 38, p. 239.

[221] *Annuaire de l'Institut de droit international, 1937* (Brussels), vol. 40, p. 271.

[222] North Sea Continental Shelf cases, judgment, *I.C.J. Reports 1969*, p. 9.

[223] *Ibid.*, p. 47.

[224] *Ibid.*, p. 46.

[225] *Ibid.*, p. 48.

[226] *Ibid.*, p. 50.

1. *Separation of parts of a State when the predecessor State ceases to exist*

(a) *Property situated in the territory of the State which has ceased to exist*

(18) Immovable property must logically be attributed to that one of the successor States in whose territory it is situated.

(19) Thus, in the opinion of Fauchille, since the predecessor State has ceased to exist, the property in its domain must be transferred to the successor States.[227] For instance, article 15 of the Treaty of 19 April 1839 dividing the Netherlands into two separate kingdoms, Belgium and Holland, provided as follows:

> Public or private utilities, such as canals, roads or others of a similar nature, *constructed, in whole or in part, at the expense of the Kingdom of the Netherlands,** shall belong, with the benefits and charges attaching thereto, to the country in which they are situated.[228]

It will be noted that the treaty article quoted above identifies the property subject to succession as being only that acquired at the expense of the Kingdom of the Netherlands. State property proper to Belgium or to Holland could not be affected by the succession of States.

(20) Bustamante adopts the same solutions as Fauchille:

> In cases where a State is divided into two or more States and none of the new States retains or perpetuates the personality of the State which has ceased to exist, the doctrines with which we are already familiar[229] must be applied to public and private property which is within the boundaries of each of the new States . . . [230]

(21) These old solutions have been applied in modern cases of succession, since, upon the dissolution of the Federation of Rhodesia and Nyasaland in 1963, "freehold property of the Federation situate in a Territory would vest in the Crown in right of the Territory", as was noted by one author.[231]

(22) Nevertheless, there might be cases where inequality would result from the fact that all or nearly all of the immovable property belonging to the union was situated in the territory of one State even though it had been acquired with common funds. In such cases, the other States should perhaps be compensated, proportionately to their contribution if it can be determined, or in a just and equitable proportion if the share which they contributed cannot be evaluated.

(23) Practice seems to have tended in this direction. For example, in the case of Senegal, a threefold succession was necessary: to France, to former French West Africa and to the Federation of Mali. An inter-State conference met in Paris and decided, unanimously, on 5 and 6 June 1959, to adopt the principle of geographical apportionment of immovable (and movable) assets, subject to compensatory payments to equalize the portions.[232]

(24) Paragraph 1 of the article proposed by the Special Rapporteur in fact makes provision for this criterion of geographical apportionment, subject, however, to treaty provisions, which may always exclude it or modify its application to suit individual cases—for instance through compensatory equalization payments of this kind, or the relinquishment of some movable property.

(25) In the case of movable property, the solution appears to be somewhat more complicated. First, the whereabouts of movable property may be entirely fortuitous, being due solely to the movable nature of the property, and its presence in the territory of a State is not, therefore, a valid criterion for devolution. Secondly, if the requirement of a direct and necessary link with the territory is involved, several of the successor States may be equally affected and may assert the existence of such a link with the aim of obtaining the property in question. In such cases equity must be applied, according to different principles, which will vary according to the movable property involved in the succession.

(26) For instance, in the case of debt-claims (*créances*), there is a category consisting of claims belonging as of right to the separated part of territory; the debtor, the title or the pledge (if any) may be situated either within that territory or outside its geographical boundaries. In this case, the debt-claims must normally be attributed to the territory with which they have such a link. However, there are also debt-claims which belong to the predecessor State and arise out of its activity or sovereignty in the territory concerned. The only solution in this case is an apportionment based on equity. Lastly, there are debt-claims of yet another type, namely, those of the predecessor State which have no particular link with any of the parts of territory that have become successor States. Here more than ever the extinction of the predecessor State makes the criterion of equity necessary.

(27) In the case of *assets of the institution of issue*, paragraph 2 of the article makes it possible to apply a geographical key for apportionment. The apportionment of the assets of the joint institution of issue and of gold and foreign exchange reserves must, to be fully equitable, be made in proportion to the volume of currency circulating or held in each territory of the predecessor State which becomes a successor State. However, the practical solution of these problems is always extremely complex.

(28) This form of apportionment was used at the dissolution of the Federation of Rhodesia and Nyasaland.[233] With one variation, the same method was used at the dissolution of the East African Currency Board, following the establishment of the institutions of issue of Kenya, Tanzania and Uganda.[234] Once again, the principle of a *pro rata* distribution of assets according to the volume of currency

[227] Fauchille, *op. cit.*, p. 374.

[228] *British and Foreign State Papers, 1838–1839* (London, Harrison, 1856), vol. XXVII, pp. 997–998.

[229] That is to say, the principle that property passes to the successor State.

[230] A. S. de Bustamante y Sirvén, *op. cit.*, p. 316.

[231] D. P. O'Connell *op. cit.*, p. 230.

[232] See J.-Cl. Gautron, "Sur quelques aspects de la succession d'Etats au Sénégal, *Annuaire français de droit international, 1962* (Paris), vol. VIII, 1963, p. 840.

[233] D. P. O'Connell, *op. cit.*, p. 196.

[234] *Ibid.*, p. 197.

in circulation proper to each territory seems to be authoritative in this respect.

(29) However, a *pro parte* distribution eschews all economic, financial or even geographical considerations, relying only on the principle of legal equality. Yet this equality would be destroyed if one territory within a union contributing more than another territory to the economic life of that union found, upon the apportionment of assets, that it had been deprived of a portion of the results of its capacity. Hence, it appears inadvisable for the International Law Commission to venture further into the details of "equitable" or *pro parte* distribution, which is a matter for special agreements, in between the different successor States.

(30) As to the *circulation*, in the strict sense, of paper money, each successor State obviously possesses its own right of issue, but in practice the old money remains in circulation for some time.

(31) 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.[235]

(32) Thus, 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.

(33) The Polish State, reconstituted after the First World War from territories recovered from Germany, Austria, Hungary and Russia, introduced the zloty, 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 (cf., in particular, the Act of 9 May 1919) or declared that those currencies had lost their value as legal tender (cf., in particular, the Act of 29 April 1920).

(34) When applied to the case of *public funds and Treasury*, paragraph 2 of the proposed article again appears to be an acceptable rule for the balanced apportionment of such common property among all the successor States.

International practice has sanctioned this formula of liquidation in accordance with the principles of equity. The Special Rapporteur has 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. While he believes that the principle of equity should and must be fully applied, he also believes that any apportionment, if it is to be equitable, must take into account a great many factual data which vary from country to country and situation to situation and which defy codification. In other words, equity means everything and means nothing, and it is as well to leave its exact content to be spelt out in individual agreements.

(35) 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.[236]

(36) Where *archives* are concerned, the link with the territory is the determining factor. 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.

(37) As examples, one might consider the dissolution of the union between Sweden and Norway, the dismemberment of Austria-Hungary and the dissolution of the union between Denmark and Iceland.

(38) Sweden and Norway concluded several conventions for the disposal of property *"formerly held in common"*.[237] Thus the Declaration of 27 April 1906 attributes the archives of the former joint consulates to the territory to which they relate.[238]

[235] 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, pp. 561–564, and *ibid., 1919*, vol. 112, pp. 410–412. These articles 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 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.)

[236] See J.-Cl. Gautron, *loc. cit.*, p. 861.

[237] The Special Rapporteur emphasizes once again that the object of succession is the apportionment of property formerly held in common, i.e., the property of the predecessor State and not that proper to each State of the union.

[238] E. Descamps, *Recueil international des traités du XXe siècle, 1906* (Paris, Rousseau), p. 1050. This Convention will be discussed in greater detail in section (*b*) below. (Property situated outside the territory of the State which has ceased to exist.)

(39) Following the dismemberment of the Austro-Hungarian monarchy, the Republic of Austria concluded with Italy, on 4 May 1920, a special Convention for the settlement of disputes relating to the historical and artistic patrimony of the former Austro-Hungarian monarchy. The Convention contained the following provisions:

Article 1: The Kingdom of Italy recognizes the desirability, in the higher general interest of civilization, of avoiding the dispersal of Austria's historical, artistic and archaeological collections, which in their totality constitute an indivisible and renowned body of aesthetic and historical material . . .[239]

Accordingly, Italy relinquished certain items, for example a German manuscript which was in Vienna and which contained the secret instructions of the Emperor Ferdinand to the imperial ambassador at Constantinople in 1553. Article 5 of the same Convention states:

. . . the Republic of Austria undertakes to restore all archival, historical, artistic, archaeological, bibliographical and scientific material originating in the territories transferred to Italy . . . with the exception of:

. . .

(3) Objects which, *according to their origin, do not form part of the historical and intellectual patrimony of Italy or of the provinces transferred to Italy**".[240]

The link between the transferred territory and the archives is thus clearly brought out.

(40) Similarly, article 1 of the Treaty to resolve certain questions raised by the dissolution of the Austro-Hungarian monarchy, concluded between Czechoslovakia, Italy, Poland, Romania and the Serb-Croat-Slovene State on 10 August 1920 at Sèvres provides as follows:

Allied States to which territory of the former Austro-Hungarian monarchy has been or will be transferred, or which were established as a result of the dismemberment of that monarchy, undertake to restore to each other any of the following objects which may be in their respective territories:

1. Archives, registers, plans, title-deeds and documents of every kind of the civil, military, financial, judicial or other administrations of the transferred territories . . .

2. Records, documents, antiques, *objets d'art* and all scientific and bibliographical material removed from the invaded territories . . .[241]

(41) The other territories which were detached from the Austro-Hungarian Empire to form new States, such as Czechoslovakia, arranged for the archives concerning them to be handed over to them.[242]

(42) 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.[243]

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. 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 is a perfectly correct solution.

(43) 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,[244] that some 1,600 priceless parchments and manuscripts containing old Icelandic legends should be restored to Iceland. It should be noted that these items 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.

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.[245]

(b) *Property situated outside the territory of the State which has ceased to exist*

(44) Paragraph 3 of the article proposed by the Special Rapporteur deals with the problem of property situated abroad, whether movable or immovable.

(45) Writers generally take the view that the predecessor State, having completely ceased to exist, no longer has the

[239] G. F. de Martens, ed., *Nouveau Recueil général de traités* (Leipzig, Weicher, 1928), 3rd series, vol. XIX, p. 683.

[240] *Ibid.*, pp. 686–687.

[241] *British and Foreign State Papers, 1920,* vol. 113 (London, H.M. Stationery Office, 1923), p. 960.

[242] Article 93 of the Treaty of Saint-Germain-en-Laye (*British and Foreign State Papers, 1919,* vol. 112, p. 361) and article 77 of the Treaty of Trianon (*ibid., 1920,* vol. 113, p. 518).

[243] Article 11 of the Treaty of Peace with Hungary of 10 February 1947 (United Nations, *Treaty Series,* vol. 41, p. 178).

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

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

legal capacity to own property and that its property abroad would become ownerless if it were not transferred to the successor State. Consequently, there would be no reason for refusing to attribute such property to the successor States. However, to say that in the case of total succession the successor receives the State property of the predecessor because the property would otherwise become abandoned and ownerless is not a fully explicative argument. Abandonment of the property is not the reason for the right to succeed; at the most, it is the occasion for it. After all, ownerless property may be appropriated by anyone, and not necessarily by the successor. Indeed, if abandonment were the only consideration, it might seem more natural, or at least more expedient, to attribute the property to the third State in whose territory it is situated.

(46) Both in the case of the dissolution of a union and in that of the complete dismemberment of a unitary State, common property owned abroad can in fact only be apportioned "equitably" among all the successor States. Here again, the Special Rapporteur has not ventured to seek a variety of more or less precise criteria for equitable apportionment, since the whole matter depends on circumstances. In practice, such property is apportioned under special agreements between the successor States.

(47) Thus, in the Agreement concerning the settlement of economic questions arising in connexion with the dissolution of the union between Sweden and Norway, the following provisions are to be found:

> *Article 6.* (*a*) Sweden shall repurchase from Norway its ... half-share in movable property at legations abroad which was *purchased on joint account**. An expert appraisal of such property shall be made and submitted for approval to the Swedish and Norwegian Ministries of Foreign Affairs.
>
> (*b*) Movable property at consulates which was purchased on joint account shall be apportioned between Sweden and Norway, without prior appraisal, as follows:
>
> There shall be attributed to Sweden the movable property of the consulates-general in ...
>
> There shall be attributed to Norway the movable property of the consulates-general in .....[246]

With regard to immovable as opposed to movable property, article 7 states:

> The right of occupation of the consular premises in London, which was acquired on behalf of the "*Joint Fund for Consulates*"* in 1877 to have effect until 1945, and which is at present enjoyed by the Swedish Consul-General in London, shall be sold by the Swedish Consulate-General. The sale shall become final only after approval by the Swedish and Norwegian Ministries of Foreign Affairs. The proceeds of the sale shall be apportioned equally between Sweden and Norway.[247]

(48) In addition, the Declaration of 27 April 1906 by Sweden and Norway concerning apportionment of the archives of former joint legations and consulates provides that:

> (1) ... documents relating exclusively to Norwegian affairs, and compilations of Norwegian laws and other Norwegian publications, shall be handed over to the Norwegian diplomatic agent accredited to the country concerned ....[248]

This is followed by a list of the consulates whose archives were to revert to Norway and Sweden respectively.

(49) The diplomatic practice followed by Poland when it was reconstituted as a State upon recovering territories from Austria-Hungary, Germany and Russia was, as is known, to claim ownership, both within its boundaries and abroad, of property which had belonged to the territories it regained or to the acquisition of which those territories had contributed. Poland claimed its share of such property in proportion to the contribution of the territories which it recovered.

(50) However, this rule apparently has not always been followed in diplomatic practice. Upon the fall of the Hapsburg dynasty, Czechoslovakia sought the restitution of a number of vessels and tugs for navigation on the Danube. An arbitral award was made.[249]

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.[250]

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**".[251]

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.

(51) In connexion with a more recent case, D. P. O'Connell reports that, upon the dissolution of the Federation of Rhodesia and Nyasaland in 1963, agreeements were concluded for the devolution of property situated outside the territory of the union, under which Southern Rhodesia was given Rhodesia House in London and Zambia the Rhodesian High Commissioner's house.[252]

(52) 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

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[246] E. Descamps, *op. cit.*, pp. 860–861.

[247] *Ibid.*, pp. 861–862.

[248] *Ibid.*, p. 1050.

[249] 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.

[250] *Ibid.*, p. 120.

[251] *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, pp. 412–414) and article 191 of the Treaty of Trianon (*ibid., 1920*, vol. 113, pp. 564–565).

[252] D. P. O'Connell, *op. cit.*, p. 231.

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.

(53) The judgment 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 counterclaim 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 judgment 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**.[253]

(54) 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 effective authority for a number of years over a clearly defined territory.

2. *Separation of parts of a State when the predecessor State continues to exist*

(a) *Property situated in the territory to which the succession of States relates*

(55) Prior to the establishment of the United Nations, most examples of secession were to be found among cases of the "secession of colonies" because colonies were considered, through various legal and political fictions, as forming "an integral part of the metropolitan country". These cases are therefore not relevant to the situation being considered here, that of the separation of parts of a State since, according to contemporary international law these are newly independent States resulting from decolonization under the Charter of the United Nations.

(56) Since the establishment of the United Nations, there have been very few cases of secession which were not cases of decolonization. According to Sir Humphrey Waldock, the Special Rapporteur for succession of States in respect of treaties, only two can be cited: the separation of Pakistan from India and the withdrawal of Singapore from Malaysia. To these cases should be added the secession of Bangladesh. However, the Special Rapporteur has been able to obtain very little information regarding these three examples.

(57) In the case of Pakistan, D. P. O'Connell reports that an Expert Committee was appointed on 18 June 1947 to consider the problem of apportionment of the property of British India. He states that:

> The presumption guiding its deliberations was that India would remain a constant international person, and Pakistan would constitute a successor State.[254]

Thus, Pakistan was regarded as a successor by a pure fiction.

On 1 December 1947, an agreement was concluded between India and Pakistan under which each of the Dominions would become the owner of the immovable property situated in its territory. Where movable property was concerned, a great deal of equipment, especially arms, was attributed to India, which undertook to pay Pakistan a certain sum for the construction of munitions factories.

The expression "just and equitable" is frequently used in the official documents relating to the case. The following formula for apportionment was finally adopted: 82.5 per cent for India and 17.5 per cent for Pakistan in respect of all common movable property.

(58) The secession of Singapore in 1965 is a special case because, inasmuch as Singapore had separated not from a unitary State but from a federation (the Federation of Malaysia), it was agreed that all property which had belonged to Singapore before the creation of the Federation should revert to it after its secession.[255]

(59) In the case of Bangladesh, the Special Rapporteur has no information concerning succession to State property. All that could be found was a little information concerning the treatment of Pakistan's debt following the secession of Bangladesh; the Government of Pakistan agreed to accept continued responsibility, after 1 July 1973 and up to 30 June 1974, for the debt of the former Pakistan State. During that period, the two Governments were to undertake negotiations with a view to apportioning the debt.[256]

(60) This subject has not been given much attention in the literature. The writings of Bustamante may, however, be cited. On the question of secession, he stated that

> In the sphere of principles, there is no difficulty about the general principle of the passing of public property, except where the devolution of a particular item is agreed on for special reasons.[257]

Bustamante also refers to the draft code of public international law by Mr. Epitacio Pessoa (source not indicated), article 10 of which provides that "if a State is formed through the emancipation of a province [or] region . . . , property in the public and private domain situated in the detached territory passes to it".[258]

(61) Theoretically, one can take it that property used in the public service of the territory—in other words, having a

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[253] *Ibid.*, p. 208.

[254] *Ibid.*, p. 220.

[255] *Ibid.*, p. 232.

[256] *Annuaire français de droit international, 1973* (Paris), vol. XIX, (1974), p. 1074. The information is taken from a reply by the Minister of Economic Affairs and Finance to a written question from Mr. Raymond Offroy (France, *Journal officiel de la République français, Débats parlementaires: Assemblée nationale* (Paris), 8 September 1973, year 1973, No. 62 A.N., p. 3672).

[257] Bustamante y Sirvén, *op. cit.*, p. 292.

[258] *Ibid.*, p. 265.

direct and necessary link with the detached territory—must belong to the sovereignty which thereafter governs that territory. This brings us back to the explanations which were given in connexion with succession in respect of part of territory and the emergence of a newly independent State. The Special Rapporteur therefore refers the reader to his commentaries in that connexion,[259] since the situation is fundamentally the same.

(b) *Property situated outside the territory to which the succession of States relates*

(62) With respect to the ownership of property abroad, it should again be mentioned in connexion with this problem that *property proper* to the detached territory which is situated outside that territory is not affected by the succession of States. Where a State is formed as a result of the detachment of part of the territory of a State, the ownership of property belonging to that territory and situated outside its borders is not affected by the succession of States.

(63) This rule does not give rise to any doubt, 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.[260]

(64) 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 E. De Valera.

(65) When a Government of the "Irish Free State" was constituted by the Treaty between Great Britain and Ireland of 6 December 1921, this new authority claimed the funds from the United States, as the successor of the insurrectionary *de facto* government. An Irish court upheld this claim, ruling that the Government of the Irish Free State was "absolutely entitled to all the property and assets of the [*de facto*] Revolutionary Government upon which as a foundation it had been established".[261]

(66) However, an American court dismissed the claim. The two judgments to this effect rendered by the Supreme Court of New York (New York County)[262] 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.

(67) Although the case does not concern a succession of States, it affords an occasion to reaffirm that the ownership of property which is proper to a detached territory (as is the case here) should not be affected by the secession of the territory in question.

(68) The only real problem that arises is what becomes of property owned by the predecessor State and situated abroad. Since the predecessor State continues to exist, equity and common sense require that it should not be deprived of its property abroad. However, if the detached territory contributed to the constitution of such property, it is entitled to claim its share in proportion to its contribution. In this case too, as in all the others, the major element for a solution must be sought in the principle of equity.

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[259] See above, sub-sections 1 and 2.

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

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

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