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Ninth report on succession of States in respect of matters other than treaties by Mr. Mohammed Bedjaoui, Special Rapporteur - draft articles on succession in respect of State debts, with commentaries

Topic:

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SUCCESSION OF STATES IN RESPECT OF MATTERS OTHER THAN TREATIES

[Agenda item 3]

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

Draft articles on succession in respect of State debts with commentaries

[*Original: French*]
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ABBREVIATIONS

AOF	French West Africa
IBRD	International Bank for Reconstruction and Development
IMF	International Monetary Fund
OECD	Organisation for Economic Co-operation and Development
UNCTAD	United Nations Conference on Trade and Development
UNITAR	United Nations Institute for Training and Research

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

Determination of the subject-matter of the present study

1. With a view to limiting as best he can the too extensive subject of succession to public debts and maintaining a certain parallelism with the Commission's draft articles on succession to State property, the Special Rapporteur proposes to confine himself entirely to a discussion of the treatment of *State debts.*

A number of problems then arise: (*a*) what is a "State debt" for the purposes of this study or, conversely, what is a "non-State debt", to be excluded from the scope of the present inquiry? (*b*) which State is meant? (*c*) what definition should be adopted for "State debt"? (*d*) what problems are raised by succession of States with respect to State debts?

However, before considering each of these questions in turn, it should be precisely ascertained what a "debt" is, what legal relationships it creates, between what subjects it creates such relationships, and in what circumstances such relationships may be susceptible to novation through the intervention of another subject.

A. The concept of debt and the relationships which it establishes

2. This is a concept that writers do not usually define because they consider the definition self-evident. Another reason, probably, is that the concept of "debt" involves a "two-way" or two-sided problem, that can be viewed from the standpoint either of the party benefiting from the obligation (in which case there is a "debt-claim") or of the party performing the obligation (in which case there is a "debt").

From the latter standpoint an element of definition suggests itself: a debt may be viewed as a legal obligation upon a certain subject of law, called the debtor, to do or refrain from doing something, to effect a certain performance, for the benefit of a certain party called the "creditor". The relationship created by such an obligation thus involves three elements: the party against whom the right lies (the debtor), the party to whom the right belongs (the creditor), and the subject-matter of the right (the performance to be effected).

3. It should further be noted that the concept of debt falls within the category of personal obligations. The scope of the obligation is restricted entirely to the relationship between the debtor and the creditor. It is thus a "relative" obligation, in that the beneficiary (the creditor) cannot assert his right in the matter *erga omnes*, as it were. In private law, only the estate of the debtor, as composed at the time when the creditor initiates action to obtain performance of the obligation due to him, is liable for the debt.

4. In short, the relationship between debtor and creditor is personal, at least in private law. Creditor-debtor relationships unquestionably involve personal considerations that play an essential role both in the formation of the contractual link and in the performance of the obligation. There is a "personal equation" between the debtor and the creditor. "Consideration of the person of the debtor", says one writer, "is essential not only in viewing the obligation as a legal bond, but also in viewing it as an asset; the debt-claim is worth what the debtor is worth".[1] Discharge of the debt depends not only on the solvency of the debtor but also on various considerations connected with his good faith. It is therefore understandable that the creditor will be averse to any change in the person of his debtor. National laws do not normally allow the transfer of a debt without the consent of the creditor.

5. One of the problems that will arise in the course of this study is whether this also applies in international law. Especially where succession of States is concerned, the main question will be whether and in what circumstances a triangular relationship is created and dissolved between a third State as creditor, a predecessor State as first debtor and a successor State that agrees to assume the debt.

B. Exclusion of debts contracted, or guaranteed, by a non-State organ

6. Both State debts and non-State debts occur in a variety of forms, the exact features of which should be ascertained in the interest of a sounder approach to the concept of State debt. From a review of the different categories of debts there will gradually emerge *the elements of a definition of State debt,* on which the Special Rapporteur will in due course have to produce a draft article.

In State practice, in judicial decisions and in the legal literature a distinction is made among:

(*a*) State debts and debts of local authorities;

(*b*) general debts and special or localized debts;

(*c*) State debts and debts of public establishments, public enterprises and other quasi-State bodies;

(*d*) public debts and private debts;

(*e*) financial debts and administrative debts;

(*f*) political debts and commercial debts;

(*g*) external debt and internal debt;

(*h*) contractual debts and delictual or quasi-delictual debts;

(*i*) secured debts and unsecured debts;

(*j*) guaranteed debts and unguaranteed debts;

(*k*) State debts and other State debts termed "odious" debts, war debts or subjugation debts and, by extension, régime debts.

[1] H., L. and J. Mazeaud, *Leçons de droit civil,* fourth ed. (Paris, Montchrestien, 1969), vol. II, p. 1093.

In comparing these various categories of debts, the Special Rapporteur will have an opportunity to provide, by way of guide-posts, some brief remarks concerning the legal régime applicable to each of them.

1. State debts and debts of local authorities

7. A first distinction should be made between State debts and debts of local authorities. The latter are contracted not by an authority or department responsible to the central government, but by a public body that usually is not of the same political nature as the State, and that is in any event inferior to the State. Such an authority, here referred to as a local authority, has a territorial jurisdiction that is limited and is in any event less extensive than that of the State. It may be a province, a *Land*, a *département*, a region, a county, a district, an *arrondissement*, a *cercle*, a canton, a city or municipality, and so on.

8. This territorial authority may—and indeed must—have a degree of financial autonomy to be able to borrow in its own name. It nevertheless remains subordinate to the State, not being a part of the sovereign structure that is recognized as a subject of public international law. That is why the defining of a territorial authority inferior to the State, for which the Special Rapporteur proposes to use the simpler term "local authority", is normally a matter of internal public law, and no definition of it exists in international law.

9. Nevertheless, internationalists have at times been concerned to define an authority such as the *commune*. Such an occasion arose in particular when article 56 of the Regulations annexed to the Convention respecting the law and customs of war on land, signed at The Hague on 18 October 1907,[2] and following up the Hague Convention of 1899, sought to provide for a system for the protection of public property, including property owned by municipalities (*communes*), in case of war. The term "commune" then attracted the attention of internationalists.[3]

In any event, a local authority is a public-law territorial body other than the State. Whatever debts it may contract by virtue of its financial autonomy are not legally debts of the State and do not bind the latter, precisely because of that financial autonomy.

10. Strictly speaking, a study of State succession should not be concerned with what becomes of "local" debts because prior to succession such debts were, and after succession will be, the responsibility of the detached territory. Never having been assumed by the predecessor State, they cannot be assumed by the successor State. The territorially diminished State cannot transfer to the enlarged State a burden that it did not itself bear and had never borne. In this case there is no subject-matter of State succession, which consists in the substitution of one State for another. This does not apply, however, in the case of "localized" debts, contracted by the predecessor State for the benefit of the territory now detached. Here there is subject-matter for the theory of State succession, the question being whether such a localized debt of the predecessor State is transmissible to the successor State.

11. Legal theory on all these points is not as clear as might be desired. A distinction should be made between *debts proper* to the transferred territory, which was responsible for them before State succession and for which it alone will be responsible afterwards, and debts of the State incurred either for the general good of the national community or solely for the benefit of the territory now detached. What becomes of these two categories of State debts is a question that must be settled in the theory and practice of State succession.

12. There is almost unanimous agreement among legal writers on the rule that "local" debts should pass to the successor State. This may not be incorrect in substance, but at the least it is badly expressed. If it is clearly established that the debts in question are local debts, as distinct from other debts, then they will be debts proper to the detached territory. They will not of course be the responsibility of the diminished predecessor State, and from that standpoint the writers concerned are justified in their view. But it does not follow that such debts will become the responsibility of the successor State, as these writers claim. They were and will continue to be debts to be borne solely by the territory now detached. Obviously, however, in the case of one type of State succession, namely, decolonization, debts proper to the territory, or "local" debts (in relation to the metropolitan territory of the colonial Power), are assumed by the successor State, since in this case the detached territory and the successor State are one and the same.

13. However, a careful distinction must now be drawn between *local debts*, meaning those contracted by a territorial authority inferior to the State, and *localized debts*, which may be the responsibility of the State itself and for which the State is liable. The comparison that follows between general debts and special or "localized" debts will make this distinction clear.

2. General debts and special or localized debts

14. In the past, a distinction was made between "general debt", regarded as State debt, and regional or local debts contracted, as noted above, by an inferior territorial authority with sole responsibility for this category of debts.

It is now possible to envisage a further category, comprising what are called "special" or "relative" debts incurred by the *predecessor State* solely to serve the needs of the territory concerned. *A clear distinction should therefore be drawn between a local debt (which is not a State debt) and a localized debt (which may be a State debt).* The criterion for making this distinction is whether or not the State itself contracted the loan earmarked for local use. It has been accepted to some extent in international practice that local debts remain entirely the responsibility of the part of territory which is detached, the predecessor State not having to bear

[2] J. B. Scott, *The Proceedings of the Hague Peace Conferences* (New York, Oxford University Press, 1920), vol. I, p. 623.

[3] See O. Debbasch, *L'occupation militaire—Pouvoirs reconnus aux forces armées hors de leur territoire national* (Paris, Librairie générale de droit et de jurisprudence, 1962), pp. 29 and 30 and foot-notes 34 and 35.

any portion of them. As will be seen later, this is simply an application of the adage *res transit cum suo onere*.

15. Writers differentiate among several categories of "local" debts, but do not always draw a clear dividing line between these and "localized" debts. The point should be more clearly analysed. "Local" debt is a concept that may sometimes appear to be relative. Before a part of a State's territory detaches itself, debts are considered local because they have various links to that part of territory. At the same time, however, there may also be an obvious linkage to the territorially diminished State. The question is whether the local character of the debt outweighs its linkage to the predecessor State. It is mainly a problem of determination of degree.

16. The following criteria may be suggested for distinguishing between localized State debts and local debts:

(*a*) Who the debtor is: a local authority or a colony or, for and on behalf of either of these, a central government;

(*b*) Whether the part of territory that is detached has financial autonomy, and to what degree;

(*c*) To what purpose the debt is to be put: for use in the part of territory that is detached;

(*d*) Whether there is a particular security situated in that part of territory.

Although these criteria are not absolutely reliable, each can provide part of the answer to the question whether the debt should be considered primarily as a local or as a State debt.

17. That is why legal theory on the question fluctuates. It is not always easy to ascertain whether a territorial authority other than the State really has financial autonomy and what is the extent of its autonomy in relation to the State. Moreover, even when the State's liability (in other words, the fact that the debt contracted is a State debt) is clear, it is not always possible to establish with certainty the intended purpose of each individual loan at the time it is contracted, where the corresponding expenditure is to be effected and whether the expenditure actually serves the interests of the detached territory.

18. (A) The personality of the debtor remains the least uncertain of the criteria. If a local territorial authority has itself contracted a debt, there exists a strong presumption that it is a local debt. The State is not involved, nor will it be any more involved simply because it becomes a predecessor State. Hence neither will the successor State be involved. There will be no subject-matter for State succession here.

If the debt is contracted by a central government, but expressly on behalf of the detached local authority, it is legally a State debt. The Special Rapporteur proposes that it be called a *localized State debt*, because the State intends the funds borrowed to be used for a specific part of the territory. If the debt was contracted by a central government on behalf of a colony, the same situation should in theory prevail.

19. (B) The financial autonomy of the detached part of territory is another useful criterion, although in practice it may prove difficult to draw absolutely certain conclusions from it.

A debt cannot be considered local unless the part of territory to which it relates has some degree of financial autonomy. But does this mean that the province or colony must be financially independent? Or is it sufficient that its budget is separate from the general budget of the predecessor State?

20. Again, is it sufficient that the debt is distinguishable or, in other words, identifiable by the fact that it is included in the detached territory's own budget? What, for example, of certain "sovereignty expenditures" covered by a loan, which a central government requires to be included in the budget of a colony and whose purpose is to install settlers from the metropolitan country or to suppress an independence movement? [4] Inclusion of the loan in the local budget of the territory because of its financial autonomy does not suffice to conceal the fact that debts contracted for the purpose of making such expenditures are State debts.

21. (C) This leads to the third criterion, namely, the intended purpose and actual use of the debt that has been contracted. In and of itself, this criterion cannot provide the key for distinguishing between local (non-State) and "localized" (State) debts. A central government, acting in its own name, may decide, just as a province would always do, to devote the loan it has contracted to a local use. It is a State debt earmarked for territorial use. The criterion of intended purpose must be combined with the others to determine whether the debt is or is not a State debt. In other words, implicit in the concepts of both "local" and "localized" debt is a presumption that the loan will actually be used in the territory concerned. This may or may not be a strong presumption. It is therefore necessary to determine the degree of linkage needed to justify a presumption that the loan will be used in the territory concerned. In the case of local debts, contracted by an inferior territorial authority, the presumption is naturally very strong; a *commune* or city generally borrows for itself, and not in order to allocate the proceeds of its loan to another city. In the case of localized debts contracted by the central government with the *intention* of using them specifically for a part of territory, the presumption is obviously less strong.

22. To refine the argument still further, three successive stages may be discerned in a localized State debt. First, the State must have intended the corresponding expenditures to be effected for the territory concerned (*the criterion of earmarking or intended use*). Next, the State must actually have used the proceeds of the loan in the territory concerned (*the criterion of actual use*). Lastly, the expenditure must have been effected for the benefit and in the actual interest of the territory in question (*the criterion of the interest or benefit of the territory*). On these terms, abuses by a central government could be avoided and such problems as those of régime debts or subjugation debts could be resolved in a just and satisfactory manner.

23. (D) An additional item of evidence is the possible existence of securities or pledges for the debt.

[4] This raises the problem of "odious" debts, régime debts, war debts or subjugation debts. See chap. III below.

This is the last criterion. A debt may be secured, for instance, by real property or fiscal resources, and the property may be situated or the taxes levied either throughout the territory of the predecessor State or only in the part of territory detached from that State. This may provide additional indications as to whether the debt is or is not a State debt. But the criterion should be cautiously applied for this purpose, since both the central government and the province may offer securities of this nature for their respective debts.

24. When it has been ascertained with sufficient certainty that the debt is a State debt, it remains to be determined—and this is the subject-matter of the study on State succession—what finally becomes of the debt. The successor State is not necessarily liable for it. For example, in the case of a State debt secured by property belonging to the detached territory, it is by no means certain that the loan was contracted for the benefit of the territory in question. Perhaps the predecessor State had no other property that could be used as security; it would be unfair to place the burden of such a debt on the successor State simply because the territory that has become joined to it had the misfortune to be the only part capable of providing the security. In any case, such a debt is a State debt (not a local debt), for which the predecessor State was liable, and the purpose of the study on State succession is to determine what becomes of it.

25. In the case of debts secured by local fiscal resource, the presumption is stronger. As this form of security is possible in any part of the territory of the predecessor State (unless special revenue is involved), the linkage with the part of the territory that has been detached is specific in this case. However, as in the case of debts secured by real property, the debt may be either a State debt or a local debt, since both the State and the province can secure their respective debts with local fiscal resources.

26. The report of the International Law Association, for its part, subdivides public debts into three categories:

(a) *National debt:* "The national debt, that is, the debt shown in the general revenue accounts of the central government and unrelated to any particular territory or any particular assets";

(b) *Local debt:* "Local debts, that is, debts either raised by the central government for the purpose of expenditure in particular territories, or raised by the particular territories themselves";

(c) *Localized debt:* "Localized debts, that is, debts raised by a central government or by particular territorial governments with respect to expenditure on particular projects in particular territories". [5]

27. The above definition of general or "national" debt would appear acceptable to the Special Rapporteur, subject to a comment to be made in due course. [6] However, the Special Rapporteur does not subscribe to the definitions of local debts and localized debts, since they are not suitable for distinguishing State debts from non-State debts. In addition, the contrast between "local" and "localized" debts does not emerge clearly from these definitions, so that the difference between the two is not readily discernible.

28. In brief, the Special Rapporteur is of the opinion that a *local debt* may be said to be a debt: (*a*) that is contracted by a territorial authority inferior to the State; (*b*) to be used by that authority in its own territory; (*c*) such territory has a degree of financial autonomy; (*d*) with the result that the debt is identifiable.

29. In addition, the Special Rapporteur designates as a *localized debt* a *State* debt that is used specifically by the State in a clearly defined portion of territory. Because State debts are not generally "localized", it is believed that they should be described as such if that is in fact what they are. This is superfluous in the case of local debts, all of which are "localized", in that they are situated and used in the territory. The reason for specifying that a debt is "localized" is that it is a State debt that happens to be, by way of exception, geographically "situated". *In short, while all local debts are by definition localized, State debts are usually not; when they are, this must be expressly indicated so that it will be known that such is the case.*

3. State debts and debts of public enterprises

30. The Special Rapporteur wishes to limit this study solely to State debts, excluding any debts that might be contracted by public enterprises or public establishments. It is sometimes difficult, under the domestic law of certain countries, to distinguish the State from its public enterprises. And when it proves possible to do so, it is even more difficult not to consider debts contracted by a public establishment in which the State itself has a financial participation as State debts.

31. There arises, first of all, a problem in defining a public establishment or public enterprise. [7] The Special Rapporteur dealt with this in his sixth report, when he took up the problem of the property of such public bodies. [8] These are entities distinct from the State

[5] International Law Association, *Report of the Fifty-fourth Conference, held at The Hague, 23rd-29th August 1970* (London, 1971), p. 108.

[6] See para. 62 below.

[7] The Special Rapporteur will use these two terms interchangeably, even though the legal régime for the bodies in question may be different under the domestic law of certain countries. In French and German administrative law, the "établissement public" or "öffentliche Anstalt" are distinguished from the "entreprise publique" or "öffentliche Unternehmung". English law and related systems seem to make little distinction between a "public corporation", an "enterprise", an "undertaking" and a "public undertaking" or "public utility undertaking". Spain has "institutos públicos", Latin America has "autarquías", Portugal has "estabelecimentos públicos" or "fiscalias" and Italy has "enti pubblici", "imprese pubbliche", "aziende autonome" and so on. See W. Friedmann, *The Public Corporation: A Comparative Symposium*, University of Toronto School of Law, *Comparative Law Series*, vol. 1 (London, Stevens, 1954).

[8] See *Yearbook... 1973*, vol II, pp. 59-61 and 63, document A/CN.4/267, part four, articles 32-34.

International judicial bodies have had to consider the definition of public establishments, in particular:

(*a*) In an arbitral award by Beichmann (Case of German reparations: *Arbitral award concerning the interpretation of article 260 of the Treaty of Versailles* (arbitrator F. V. N. Beichmann), publi-

(*Continued on next page.*)

which have their own personality and usually a degree of financial autonomy, are subject to a *sui generis* juridical régime under public law, engage in an economic activity or provide a public service and have a public or public-utility character. Professor Ago describes them as "public corporations and other public institutions which have their own legal personality and autonomy of administration and management, and are intended to provide a particular service or to perform specific functions". [9] In the *case of certain Norwegian loans*, considered by the International Court of Justice, the agent of the French Government, Professor Gros, stated:

> ... in domestic law ... a public establishment is brought into existence in response to a need for decentralization; it may be necessary to allow a degree of independence to certain establishments or bodies, either for budgetary reasons or because of the purpose they serve—for example, an assistance function or a cultural purpose. This independence is achieved through the granting of moral personality under domestic law. [10]

32. The Special Rapporteur does not have to discuss here the question, settled by the Commission, whether in respect of *international responsibility* the debt of a public establishment may be considered a State debt. His purpose is to determine *whether in respect of State succession* the debt of such a body is a State debt. The answer, obviously, can only be in the negative. The category of debts of public establishments will therefore be excluded from the scope of this inquiry, just as that of debts of inferior territorial authorities, although both are of a public character. This public character does not suffice to make the debt a State debt, as will be seen below in the case of another category of debts.

4. Public debts and private debts

33. The preceding comments show that it is absolutely necessary, although by no means sufficient, that a debt should have a public character if it is to be identified as a State debt.

A "public debt" is an obligation binding on a public authority, as opposed to a private body or an individual. But the fact that a debt is called "public" does not make it possible to identify more completely the public authority that contracted it, so that this may be the State, a territorial authority inferior to it, or a public institution or establishment distinct from the State. The term "public debt" (as opposed to private debt) is therefore not very useful in identifying a State debt. This term is too broad and covers not only State debts, which are the subject of this study, but also the debts of other public entities, whether or not of a territorial character.

5. Financial debts and administrative debts

34. Financial debts are associated with the concept of credit. Administrative debts, on the other hand, result automatically from the activities of the public services, without involving any financing or investment. The report of the International Law Association cites several examples: [11] (*a*) certain expenses of former State services; (*b*) debt-claims resulting from decisions of public authorities; (*c*) debt-claims against public establishments of the State or companies belonging to the State; (*d*) building subsidies payable by the State; (*e*) salaries and remuneration of civil servants. [12]

35. While financial debts may be either public or private, administrative debts can be only public. But the fact that the former may, and the latter must, be of a public character does not suffice to make them State debts. The Special Rapporteur will concern himself only with State debts, whether financial or administrative.

6. Political debts and commercial debts

36. Whereas commercial debts may be State debts, debts of local authorities or public establishments or private debts, political debts are always State debts. Political debts fall within the scope of this study. The term, according to Gaston Jèze, should be taken to refer to

> those debts for which a State has been declared liable or has acknowledged its liability *to another State* as a result of *political events*. The most frequent case is that of a debt imposed on a defeated State by a peace treaty (war reparations etc.). Similarly a war loan made by one State to another State gives rise to a political debt. [13]

Jèze adds that "a *political* debt is one that exists only between *governments*, between *one State and another. The creditor is a State; the debtor is a State. It is of little consequence whether the debt arises from a loan or from the imposition of war reparations.*" [14]

37. The same author contrasts political debts, which establish an inter-State relationship between the creditor and the debtor, with commercial debts, which are "those arising from a loan contracted by a State with private parties, whether bankers or individuals". [15] The Special

(*Foot-note 8 continued.*)

cation of the Reparation Commission (Paris, 1924), annex 2145*a*, and United Nations, *Reports of Arbitral Awards*, vol. 1 (United Nations publication, Sales No. 1948.V.2), pp. 453 *et seq.*);

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

(*c*) In a decision of the Permanent Court of International Justice in a case relating to a Hungarian public university establishment (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, pp. 236 *et seq.*).

[9] *Yearbook... 1971*, vol. II (Part One), p. 254, document A/CN.4/246 and Add.1-3, para. 163.

[10] *I.C.J. Pleadings, Case of certain Norwegian loans* (France v. Norway), vol. II, p. 72. (Translation from French.)

[11] International Law Association, *op. cit.*, pp. 118-121.

[12] See *Materials on succession of States* (United Nations publication, Sales No. E.68.V.5), pp. 114 and 115 (Poldermans v. State of the Netherlands: judgement of 8 December 1955).

[13] G. Jèze, "Les défaillances d'Etat", *Recueil des cours de l'Académie de droit international de la Haye, 1935-III* (Paris, Sirey, 1936).

[14] *Ibid.*, pp. 383 and 384.

[15] *Ibid.*, p. 383.

Rapporteur need not deal with private commercial debts, or even with public commercial debts if they are not contracted by the State itself.

38. The International Law Association distinguishes among debts according to their form, their purpose and the status of the creditors:

> The loans may be made by:
>
> (*a*) Private individual lenders by means of individual contracts with the government;
>
> (*b*) Private investors who purchase "domestic" bonds, that is, bonds which are not initially intended for purchase by foreign investors ...;
>
> (*c*) Private investors who purchase "international" bonds, that is, bonds issued in respect of loans floated on the international loan market and intended to attract funds from foreign countries;
>
> (*d*) Foreign governments for general purposes and taking the form of a specific contract of credit;
>
> (*e*) Foreign governments for fixed purposes and taking the form of a specific contract of loan;
>
> (*f*) Loans made by international organisations. [16]

Under Gaston Jèze's system of classification, types (*a*), (*b*) and (*c*) might be commercial State debts, whereas (*d*) and (*e*) might be political State debts.

7. External debt and internal debt

39. The distinction between external debt and internal debt is normally applied only to *State debts*, although it could conceivably be applied to other public debts or even to private debts.

Where this distinction is made in the present study, it will of course refer exclusively to State debts. Interna debt is one where the creditors are nationals of the debtor State, [17] while external debt includes all debts contracted by the State with other States or with foreign bodies corporate or individuals.

8. Contractual debts and delictual debts

40. Delictual debts, arising from unlawful acts committed by the predecessor State, raise special problems with regard to succession. Resolution of such problems is governed primarily by the principles relating to international responsibility of States. However, delictual debts are far less important than contractual debts. Nevertheless, the Special Rapporteur will not confine himself to a consideration of the latter, since the former also constitute State debts. Whether the source of State debts is contractual or delictual, State succession will determine what becomes of them. [18]

9. Secured debts and unsecured debts

41. Although all debts, whether private, public or State debts, may or may not be secured in some manner, this report will deal exclusively with State debts. In that connexion, the notion of secured debt is an extremely important one. A distinction must be made between two categories of debt. First, there are State debts that are especially secured by certain tax funds, it having been decided or agreed that the revenue from certain taxes would be used to secure the servicing of the State debt. Secondly, there may be cases when State debts are especially secured by specific property, the borrowing State having in a sense mortgaged certain national assets.

10. Guaranteed debts and non-guaranteed debts

42. A State's liability may arise not only from a loan contracted by the State itself but also from a guarantee that it gives in respect of the debt of another party, which may be a State, an inferior territorial authority, a public establishment or an individual.

43. When granting a loan to a dependent territory, IBRD often requires a guarantee from the administering Power. Thus, when the territory in question attains independence, two States are legally liable for payment of the debt. [19] However, a study of the actual record of loans contracted with IBRD shows that State succession does not alter the previously existing situation. The dependent territory that attains independence remains the principal debtor, and the former administering Power remains the guarantor. The only difference, which has no real effect on the treatment of the debt, is that the dependent territory has changed its legal status and become a State.

44. The real question that arises is whether the present report should deal with cases of loans contracted by a dependent territory with IBRD. Strictly speaking, these are not "State debts" but rather debts proper to the transferred territory. [20] It should be added that the main issue in State succession is not, as will be seen, [21] what becomes of the debts of the territory that has been detached, but what becomes of those of the predecessor State.

11. State debts and régime debts

45. The distinction to be made here serves not only to contrast two complementary concepts but also to point out the differences among a a set of terms that are used at various levels. For the sake of strict accuracy, State debts might be contrasted with *régime debts*, since the

[16] International Law Association, *op. cit.*, p. 106.

[17] See D. Bardonnet, *La succession d'Etats à Madagascar—Succession au droit conventionnel et aux droits patrimoniaux* (Paris, Librairie générale de droit et de jurisprudence, 1970), pp. 271 and 276.

[18] See Bardonnet, *op. cit.*, p. 305. Bardonnet refers (p. 270) to A. B. Keith, *The Theory of State Succession—with Special Reference to English and Colonial Law* (London, Waterlow, 1907), pp. 58 *et seq.*, on State succession in respect of delictual or quasi-delictual debts. See also International Law Commission, *op. cit.*, p. 122, appendix C, "Debts of the Belgian Congo", Brussels Court of Appeal, Bougnet and Hock *v.* Belgium, judgement of 4 December 1963.

[19] G. R. Delaume, *Legal Aspects of International Lending and Economic Development Financing* (Dobbs Ferry, N.Y., Oceana Publications, 1967), p. 321; K. Zemanek, "State succession after decolonization", *Recueil des cours ..., 1965-III* (Leiden, Sijthoff, 1965), vol. 116, pp. 259-260.

[20] Under IBRD's standard loan agreement, a dependent territory that has contracted a debt with the Bank becomes "a person of international law, directly responsible for the performance of the agreement" (Zemanek, *loc. cit.*, p. 259).

[21] See paras. 57 *et seq.* below.

latter—as their name indicates—are debts contracted by a political régime or a government having a particular political form.

46. However, the question here is not whether the government concerned has been replaced *in the same territory* by another government with a different political orientation, since that involves merely a succession of governments in which régime debts may be repudiated, as for example when the the Soviet Union refused to honour Tsarist debts. On the contrary, what is at issue here is a succession of States, and the question is whether the régime debts of a predecessor State pass to the successor State. For the purposes of this study, régime debts must be regarded as State debts. The Special Rapporteur does not contend that such debts pass to the successor State; indeed, he contends the contrary. [22] He wishes simply to make it clear that such debts are entirely within the scope of this report. International law does not concern itself with governments, or any other organs of the State, but with the State itself. Just as internationally wrongful acts committed by a government give rise to State responsibility, so also "régime debts", i.e. debts contracted by a government, are State debts.

47. However, it is now necessary to specify what is meant by *régime debts*. According to Charles Rousseau, these are

> debts contracted by the dismembered State in the temporary interest of a particular political form, and the term may include, in peacetime, *subjugation debts* specifically contracted for the purpose of colonizing or absorbing a particular territory and, in wartime, *war debts*. [23]

This is one application of the broader theory of "odious debts", which will be dealt with later. [24]

C. Exclusion of debts contracted by a State other than the predecessor State

48. When reference is made to *State* debts, it is necessary to specify which State is meant. Only three States could *possibly* be concerned: a third State, the successor State and the predecessor State. In fact, only one of them is legally "implicated", with regard to its debts, as a result of State succession: the predecessor State. This must be made quite clear.

1. Exclusion of debts of a third State from the subject-matter of this study

49. A third State might assume financial obligations towards another third State, towards the successor State or towards the predecessor State.

50. In the first instance, the financial relationship—like any other relationship of whatever kind between two States that are both third parties as regards the State succession—obviously cannot be affected in any way by the territorial change that has occurred or by its consequences with respect to State succession.

51. In addition, this study should not cover any financial relationship that might exist between a third State and the successor State. There is no reason why, and no way in which, debts owed by the third State to the successor—or potential successor—State should be treated differently because of State succession. Such succession does not alter the international personality of the successor State if the latter existed as a State before the succession took place. The fact that the succession may have the effect of modifying, by enlarging, the territorial composition of the successor State does not affect, and should not in future affect, debts contracted with it by a third State. If it so happened that the successor State had no international personality at the time the third State contracted a debt with it (e.g. in the case of a commercial debt contracted by a third State with a territory that was subsequently to become independent or to separate from the territory of a State in order to form another State), it is perfectly clear that accession to statehood would not cause the successor State to forfeit its rights vis-à-vis the third State.

52. As to debts owed by a third State to the predecessor State, these are *debt-claims* of the predecessor State against the third State. Such debt-claims are State property and have been considered in the context of succession of States in respect of State property. They are therefore not covered in the present study.

Debts of third States need thus in no case be considered in the present context.

2. Exclusion of debts of the successor State from the subject-matter of this study

53. The successor State may assume financial obligations either to a third State or to the predecessor State.

54. In the case of a debt of the successor State to a third State, no difficulty arises. In this instance, the debt came into existence at the time the succession of States occurred, in other words, precisely when the successor State acquired the status of successor. The only real debt of the successor State to a third State is a *debt contracted by the successor State on its own account*, and in this case it is clearly unconnected with the succession of States that has occurred. Any debt for which the successor State could be held liable vis-à-vis a third State *by the very fact of succession of States* would not, strictly speaking, be a debt *contracted directly* by the former to the latter but rather a debt *transmitted indirectly* to the successor State as a result of the State succession. A quite different type of debt by the successor State to a third State must be excluded from this study, namely, the type of debt that in the strict legal sense is a debt *of the successor State*, actually contracted by that State with the third State and coming into existence in a context completely unconnected with a succession of States. In cases where this kind of debt was incurred after State succession, it is *a fortiori* excluded from this study.

55. Debts of the successor State to the predecessor State may have two possible origins. First, they may be completely unconnected with the relationship between the predecessor State and the successor State created

[22] See chap. III below.

[23] C. Rousseau, *Droit international public* (Paris, Sirey, 1977), vol. III, p. 458.

[24] See chap. III below.

and governed by State succession, in which case they should clearly remain outside the area of concern of the Special Rapporteur. This is the kind of debt that must be excluded from this study.

56. They may also be debts contracted by the successor State with the predecessor State *as a result of State succession*; this presupposes the existence of liabilities that would have to be assumed by the successor State during, and in consequence of, the process of State succession. For example, the successor State might be required to pay certain sums in compensation to the predecessor State as a financial settlement between the two States. The object of the study of State succession is to determine what ultimately becomes of debts contracted previously; however, the sums referred to do not fall under the heading of such debts. The problem has already been resolved by the State succession, and it can now be said not that these debts *do not* concern succession of States, but that they *no longer* concern it.

3. Debts of the predecessor State the only subject-matter of this study

57. The predecessor State may have contracted debts either to the future successor State or to a third State. In both cases, these are debts directly related to succession of States, the difference being that, in the case of a debt of the predecessor State to the successor State, the only possibility to be envisaged is non-transmission of the debt, since deciding to transmit it to the successor State—which is the creditor—would mean cancellation or extinction of the debt. In this case, transmitting the debt would in fact mean not transmitting it, that is, extinguishing it.

58. In any event, the basic purpose of the study of State succession is to determine what becomes of debts contracted by the predecessor State, and by it alone; for it is the territorial change affecting the predecessor State, and it alone, that triggers the phenomenon of State succession. The change that has occurred in the area of the territorial jurisdiction of the predecessor State raises the problem of the identity, continuity, diminution or disappearance of the predecessor State and thus causes a change in the territorial jurisdiction of the debtor State. The whole problem of succession of States in respect of public debts is whether this change has any effect and, if so, what effect, on debts contracted by the State in question.

D. Definition of State debts

59. Some writers simply confuse "public debts" with "State debts". For example, Gaston Jèze writes:

> A public debt is the individual legal situation of the State's administrative patrimony: it is the legal obligation of the administrative patrimony to pay a certain sum of money to a given creditor. [25]

This definition is not very helpful for the purposes of the present study.

60. Another writer, Alexandre Sack, gives a much simpler and more accurate definition when he states that "1. Public State debts are debts of the State, of a political community organized as a State". Logically, this definition amounts to the almost tautological statement that "State debts are debts of the State". However, the author supplements this first part of his definition with two others:

> 2. From the point of view of their material content, these debts are *contractual obligations* of the State. By lending to the State or purchasing State bonds, public creditors become the possessors of acquired rights, namely, debt-claims against the debtor State.
> 3. State debts are guaranteed by the entire patrimony of the State.[26]

61. The Special Rapporteur indicated earlier [27] that he intended to confine himself to the question of contractual State debts and to leave aside debts of a delictual or quasi-delictual origin. However, contrary to the view of the author quoted above, contractual State debts do not arise solely from *loans*—although, for convenience, the Special Rapporteur will himself base his arguments throughout the present study on cases of State loans. It is none the less understood that a State debt may be a commercial, administrative or other debt. In addition, by including in his definition of State debt the additional point that such debts are "guaranteed by the entire patrimony of the State", the author in question is referring to the concept of the patrimonial State, and accordingly draws conclusions, some of which are questionable, with regard to State succession. It is therefore preferable to remove this complicating factor from the definition.

62. It will also be recalled that the International Law Association defined *national debt* as follows: "the national debt, that is, the debt shown in the general revenue accounts of the central government and unrelated to any particular territory or any assets". [28] This cannot be faulted as a definition of the "national" debt, which is indeed a State debt. And it would be quite correct to say that a "State debt" is also a debt that is chargeable solely to the treasury of the central government. However, there is in addition a form of State debt that is contracted by the organs of the central government and charged to the general treasury of the State but that has been used, by decision of the State, to meet the exclusive needs of a particular territory. This is the kind of debt that the Special Rapporteur has called a "localized debt", because it is a State debt contracted in the exclusive interests of a particular territory. [29] Thus it may be seen that a "national" debt may have a direct relationship wit a particular territory. The debtor is the State and the user is a given province.

63. In short, a State debt should not be defined in terms of the needs that it was used to meet, which may be either general or specific. It should be defined by the fact that (*a*) it was contracted by the central government of the State and is therefore legally binding on the State itself, and that (*b*) it is chargeable to the central

[25] G. Jèze, *Cours de science des finances et de législation financière française*, 6th ed. (Paris, Giard, 1922), p. 215.

[26] A. N. Sack, "La succession aux dettes publiques d'Etat", *Recueil des cours ... 1928-III* (Paris, Hachette, 1929), vol. 23, p. 153.

[27] See para. 40 above.

[28] See para. 26 above.

[29] See paras. 14 *et seq.* above.

treasury of the State. There is a correlation here between the party that is legally bound and the party that is financially chargeable with the debt.

Accordingly, a very simple article could be drafted along the following lines:

Article O. Definition of State debt

For the purposes of the present articles, State debt means a financial obligation contracted by the central government of a State and chargeable to the treasury of that State.

64. It may be useful, in due course, to establish "sub-definitions" of the various categories of State debts. [30] The criterion adopted will be the use made of the funds. A definition will thus be obtained of the *general debt* of the State, contracted to meet the general needs of the State, as well as of *special* or *localized State debts*, incurred by the State to meet the needs of a particular territory.

E. Problems raised by succession of States in respect of State debts

65. Having limited the subject-matter of the present inquiry to State succession in respect of "State debts", the Special Rapporteur will now examine three fundamental questions.

(*a*) Why are—or are not—State debts or guarantees of State debts assumed by the successor State? The problem here is to justify, both in practice and in theory, the transferability—or non-transferability—of the debts or guarantees to the successor State. In this connexion, reference will be made both to legal theory and to the evidence of State practice.

(*b*) What State debts (or guarantees) may be transferred to the successor State? The problem here is the criterion based on the nature of the debt and on the circumstances in which it was contracted by the predecessor State.

(*c*) How can State debts be transferred to the successor State? This problem involves the procedures for the apportionment or sharing of debts when, in certain cases, they are assigned to the predecessor and successor States in specified proportions.

66. It should be pointed out, however, that, for purposes of convenience and in the interests of over-all consistency and parallelism with the draft articles adopted by the Commission on succession in respect of treaties and in respect of State property, the Special Rapporteur will refer in the present study to the following types of succession:

(*a*) Transfer of part of the territory of a State;

(*b*) Newly independent States;

(*c*) Uniting of States;

(*d*) Separation of one or more parts of the territory of a State;

(*e*) Dissolution of a State.

67. This classification was adopted by the Commission at its twenty-eighth session in the case of State succession in respect of State property. [31] It is used here provisionally. Nothing prevents the consolidation of the last three headings, should the need arise or should this prove advisable for convenience of presentation, under one or two types of succession (e.g. uniting and dissolution of States, separation of one or more parts of the territory of a State).

1. Difficulties of the subject-matter

68. The liquidation of the bank of issue of the former Austro-Hungarian monarchy illustrates the difficulties created between the two world wars by State succession in respect of a State's assets and, above all, of its liabilities. Lloyd George, speaking at a meeting of the Supreme Council, in Paris, in January 1921, described the disintegration of the Austro-Hungarian empire with his customary wit: an explosion, he said, had taken place in Central Europe and the Austro-Hungarian monarchy had been shattered to pieces, one piece landing in Italy, another in Serbia, another, crossing the Carpathians, had crashed in Romania, another had become a part of Poland, yet another had formed a State that was apparently called Czechoslovakia, while two others had remained bleeding on the banks of the Danube. [32]

69. The difficulties involved in settling assets and liabilities in a case of State succession in general, and specifically in the case of the monarchy's bank of issue following the "fission" of the diverse ethnic fragments that had made up the Austro-Hungarian empire, gave rise to the story that a Viennese wit, dreaming of the apocalypse, was transported to the valley of Josaphat on judgement day, where he stood before St Peter. The latter, after calling the roll of the living and the dead, informed God that he could begin to pass judgement. The omniscient Lord replied: "Impossible! The three liquidators of the Bank of Austria-Hungary have not finished their work!" [33]

70. In his very first report, the Special Rapporteur observed:

> International practice with regard to succession to public debts is unusually complex, either because the very nature of the problems to be solved varies with the circumstances of each case or because there are several categories of debts, each raising different questions. This complexity is reflected in the diversity of views expressed in the literature and the divergencies of practice, where treaty obligations are rarely respected. [34]

A. A. Fatouros, in turn, refers to the proverbial complexity, imprecision and difficulty of the problems of State succession in respect of public debts. [35]

[30] See paras. 175 *et seq.* below.

[31] See *Yearbook... 1976*, vol. II (Part Two), pp. 127 and 128, document A/31/10, chap. IV, sect. B.

[32] 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*, vol. XLVI (Paris, April-June 1923), p. 161.

[33] *Ibid.*, p. 185.

[34] *Yearbook... 1968*, vol. II, p. 109, para. 95, document A/CN.4/204.

[35] A. A. Fatouros, "La succession d'Etats dans les matières autres que les traités" (report of the United Nations regional symposium on international law for Africa held in Accra, Ghana, from 14 to 28 January 1971, organized by UNITAR at the invitation of the Government of Ghana), p. 22.

Daniel Bardonnet notes:

It is a truism that the transfer of public debts raises extremely complex problems, both because of the wealth and diversity of treaty practice and because there are several categories of debt, each of which raises specific difficulties. As Judge Hackworth observed, no definitive conclusion can be reached on the subject "except that no universal rule of international law on the subject can be said to exist". [2]

[2] *Digest of International Law*, vol. I, p. 539. [36]

Another author notes:

The legal principles governing the effect on the public debt of a change of sovereignty are much less firmly settled than those respecting changes in the form of a debtor's government. In light of the abundant literature on this confused subject, which reflects all shades of legal, political and philosophical thinking, and the instances of State practice, which exhibit remarkable historical and geographical variations, it is impossible to formulate any universal rule. [37]

71. In the law relating to obligations, the easiest solution is not to recognize the existence of a debt but to accept the *status quo*. In a number of cases, domestic law provides for outright non-recognition of the debt-claim; Fatouros notes that, under the laws of several European States, there is a general principle in favour of the debtor, which flows by deduction from the literature or by induction from a number of precise provisions of the legal code. [38] The case in point does not involve a principle but rather a logical constraint arising from the problems of drafting the law. If these problems appear insurmountable, consideration might be given to deriving a principle from this situation.

72. At first sight, therefore, there are only two solutions: either the law recognizes the existence of a debt or the debt does not exist from a legal point of view. If this facile solution is to be avoided in more complex circumstances, the law must be formulated in sufficient detail; it must take account of the largest number of cases capable of occurring in this area. Only law that is reasonably sophisticated, covering evidence, exceptions, presumptions, prescriptions etc., is able to provide graduated solutions (e.g. partial payment of a debt claimed by a creditor). Public international law has not yet reached this level of sophistication, and that is the underlying cause of the difficulties encountered in respect of public debts in cases of State succession.

2. Diversity of theoretical opinions

73. There are two basic and opposing schools of thought: on the one hand, the voluntarist concept, which stresses State sovereignty and establishes a negative principle of non-transferability of debts; on the other hand, the objectivist concept, which attempts to establish positive rules limiting State sovereignty. The question is to what extent a codification of public international law can abandon voluntarism and postulate principles of continuity in certain cases.

[36] D. Bardonnet, *op. cit.*, p. 645.

[37] G. R. Delaume, *op. cit.*, pp. 318 and 319.

[38] A. A. Fatouros, *loc. cit.*, p. 14.

(a) *Theories favourable to the transfer of debts*

74. These theories are based on various arguments.

(*a*) *The principle of respect for acquired rights* [39] plays an important role. Here, the interests of creditors are taken into consideration. But it would seem that the problem is not whether the creditors are to be paid but rather who should pay them, the predecessor State or the successor State.

(*b*) *The theory of benefit* refers to the profit derived by the transferred territory from investments which the predecessor State made there, contracting debts accordingly. [40] This theory is based on the principles of justice and equity, but it must be admitted that it is not easily applied in practice. It should be added that its relevance is obviously limited to "localized" State debts (special State debts) or to local debts in the strict sense.

(*c*) *Considerations of justice and equity* have often been invoked for the benefit of the diminished State, especially by writers on English law and related systems. In advancing these considerations, the advocates of this doctrine have not invoked the theory of benefit.

(*d*) Some writers, for example Fauchille, have also invoked *common sense*. [41] In their view, it would be unjust for a State to be obliged to continue to assume a debt—from which the separated part of its territory may also have benefited—once it was cut off from the resources derived from that part. This clearly involves the idea of the "patrimonial State".

Another idea that follows from this one and that has been invoked in the same spirit allows its adherents to assert that the successor State is not obliged to assume debts of the predecessor State in excess of the assets it receives. Westlake took this view. [42] Fauchille says that Westlake regarded it as an application of the "principle of the right of succession under *beneficium inventorii*". [43] This is an outright transposition of private law.

(*e*) The civil-law theory based on the adage *res transit cum suo onere* was often applied by nineteenth-century writers in connexion with succession to public debts. [44] Some of them believed that it was possible in this case to invoke the existence of a "customary law" [45] or of a "recognized principle of international law, invariably

[39] See second report of the Special Rapporteur, *Yearbook... 1969*, vol. II, pp. 69 *et seq.*, document A/CN.4/216/Rev.1; S. von Pufendorf, *De jure naturae et gentium*, 1672; C. de Visscher, *Théorie et réalité en droit international* (Paris, Pédone, 1970), pp. 214 *et seq.*; N. Sack, *Les effets des transformations des Etats sur leurs dettes publiques et autres obligations financières* (Paris, Sirey, 1927), vol. I, pp. 274-280; International Law Association, *op. cit.*, pp. 106 and 107 and p. 113, foot-note relating to para. 9.

[40] See N. Politis, *Les emprunts d'Etat en droit international public* (thesis) (Paris, 1891), p. 111; Sánchez de Bustamante y Sirvén, *Droit international public* [French translation by P. Goulé] (Paris, Sirey, 1936), vol. III, pp. 277 *et seq.*

[41] P. Fauchille, *Traité de droit international public*, 8th edition of *Manuel de droit international public* by H. Bonfils (Paris, Rousseau, 1922, vol. I), p. 378.

[42] J. Westlake, *International Law*, 2nd ed. (Cambridge, University Press, 1910-1913).

[43] P. Fauchille, *op. cit.*, p. 352.

[44] A. Rivier, *Principes du droit des gens* (Paris, Rousseau, 1896), vol. 1, p. 213; see Bardonnet, *op. cit.*, p. 267, foot-note 2 and p. 269.

observed by the various political treaties concluded since the beginning of this [the nineteenth] century". [46]

(*f*) *The theory of unjust enrichment* also received support from this school of thought and is clearly derived from civil law. [47]

(b) *Theories opposed to the transfer of debts*

75. The contemporary era is much less in favour of the principle of succession to public debts. This is true, for instance, of the *positivist authors of continental Europe*, [48] but the main advocates of this view are *Anglo-American writers*. [49] Those opposed to the transfer of public debts generally advance two arguments, one derived from State sovereignty, the other from the nature of the debt. [50]

The first played a major role in the colonization era but has never lost its force, if not its timeliness, in connexion with other types of State succession. According to this argument,

> The State acquiring a territory does not gain possession of the sovereign rights of the former State, but exercises in the acquired territory only its own sovereign rights. It would follow that the acquiring State is not obliged to assume any of the obligations of the former State. [51]

The second argument, derived from the nature of the debt, stresses the *personal* nature of the debt of the predecessor State, which must continue to assume that debt unless it loses its international personality. Gaston Jèze writes:

> The dismembered State ... contracted the debt *personally*; it solemnly undertook to pay the debt *whatever might happen*. It doubtless counted on the tax revenue from the *entire* territory. Dismemberment, in the case of *partial* annexation, reduces the resources with which it expected to be able to pay its debt. *Legally*, however, the obligation of the debtor State cannot be affected by changes in the extent of its resources. [52]

76. The doctrine of the non-transferability of debts received judicial confirmation in the arbitral award made on 18 April 1925 by Eugène Borel in the *Ottoman public debt* case: [53]

> In the opinion of the arbitrator, it is not possible, despite the existing precedents, to say that the Power to which a territory is ceded is automatically responsible for a corresponding part of the public debt of the State of which the territory previously formed part.

77. Professor Rousseau considers the voluntarist theories that reject the transfer of debts as open to serious objections. They lead to

> deplorable results, in fact to the imposition of a crushing burden on the dismembered State, which is left with its debts but has been deprived of the means of paying them. Lastly, and above all, it must be remembered that the State is never anything more than the political organization of a society of human beings possessing economic means. That being so, it is unjust that political dissociation should allow these persons to evade their obligations. [54]

This argument has only partial validity. The voluntarist theories imply a welcome rejection of the idea of the "patrimonial State". Moreover, although the interests of creditors certainly deserve to be protected, such protection cannot be absolute; whoever accepts a State commitment incurs the risk that the State will become insolvent, whether owing to territorial change or for some other reason. [55] These risks exist for all creditors, no matter who their debtors may be; they are inherent in the status of creditor. [56]

78. It is true that these differences of opinion among legal writers may be explained largely by the special interests of the State of which a given writer is a national. These interests give rise to substantial differences in the solutions adopted in practice.

3. Divergent historical precedents

79. Sánchez de Bustamante y Sirvén [57] differentiates among three main categories of treaties:

(*a*) Those that admit obligations only in the case of regional or local debts of the predecessor State;

(*b*) Those that consent to participation in the general or national debt of the predecessor State;

(*c*) Those that implicitly or explicitly reject all debts.

The divergencies in historical precedents may be explained by differences as regards: (1) the recognition—contained in the solution adopted—of a rule of law; (2) the era; (3) the political circumstances in which the

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[45] L. Le Fur, "Chronique des faits internationaux: B. Conséquences des annexions territoriales effectuées par les Etats-Unis", *Revue générale de droit international public*, vol. VI (Paris, 1899), p. 621, foot-note 2:

> "The fourteen partial treaties that were signed by the various nations participating in the Congress of Vienna in application and development of the principles laid down by the Congress all refer to this provision, which thus acquires the status of a *customary clause of public international law* *."

[46] C. Calvo, *Le droit international théorique et pratique*, 5th ed. (Paris, Rousseau, 1896), vol. IV, p. 404.

[47] N. Politis, *op. cit.*, p. 111; A. Cavaglieri, *La dottrina della successione di stato a stato* (Pisa, Archivio giuridico, 1910), pp. 109 *et seq.* and 134 *et seq.*; G. Jèze, *Cours de science des finances...*, *op. cit.*, p. 328; International Law Association, *op. cit.*, p. 108; A. Sánchez de Bustamante y Sirvén, *op. cit.*, pp. 321 *et seq.*

[48] W. Schönborn, "Staatensukzessionen", *Handbuch des Völkenrechts* (Stuttgart, Kohlhammer, 1913), vol. II, sect. 5. See also the works of Strupp, Zorn, Cavaglieri, Jèze, Feilchenfeld etc.

[49] See the works of Lawrence, Hall, Westlake, Moore and especially Keith, *op. cit.* (see foot-note 18 above), pp. 5-10, 58,61, 72 and 99 *et seq.*

[50] For a complete presentation of the arguments, see in particular A. N. Sack, "La succession aux dettes publiques d'Etat", *loc. cit.*, pp. 283-293.

[51] *Ibid.*, p. 283.

[52] G. Jèze, "L'emprunt dans les rapports internationaux—La répartition des dettes publiques entre Etats au cas de démembrement du territoire", *Revue de science et de législation financières*, vol. XIX (Paris, Jan.-March 1921), No. 1, p. 65.

[53] United Nations, *Reports of International Arbitral Awards*, vol. I, p. 573.

[54] C. Rousseau, *op. cit.*, p. 430.

[55] Professor Cavaré takes the contrary view. He writes:

> The interests of the creditors ... must be protected. The rights acquired by private persons must always be safeguarded. Such persons know that their debts "constitute an encumbrance on the territory of the debtor State" and that the "former and new" governments exercising authority over that territory have assumed a commitment to them.

See L. Cavaré, *Le droit international public positif*, 3rd ed. (Paris, Pédone, 1967), vol. I, p. 369, who cites in support of his theory A. N. Sack, *Les effets des transformations des Etats ...*, p. 58.

[56] Bardonnet, *op. cit.*, p. 281; Jèze, "L'emprunt dans les rapports internationaux", *loc. cit.*, p. 66.

[57] Sánchez de Bustamante y Sirvén, *op. cit.*, p. 282, No. 694.

territorial change took place; (4) the ratio of forces; (5) the solvency of the parties; (6) the interests involved and the character and nature of the debts.

80. In principle, the absence of a treaty must be interpreted as a refusal by the successor State to assume part of the debt of the predecessor State. However, the contrary is not necessarily true; in so far as a treaty does not recognize the principle of the obligation to succeed to debts but accepts it "spontaneously and voluntarily" or "as a favour", that treaty cannot serve, without reservation, as a precedent confirming a rule of succession. Thus, while treaties themselves have binding force, they do not always imply recognition of a rule of law through the solution adopted, but often express considerations of expediency or moral obligations. The exact significance of treaty provisions is therefore quite difficult to determine. In any event, it would be somewhat unwise to interpret their solutions literally with a view to deducing an absolutely certain rule of law.

81. A similar problem arises in connexion with the date of historical precedents: does a change of practice always nullify the importance and significance of earlier practice? The answer seems to be in the negative in so far as the circumstances, too, have changed. Of course, however, if historical precedents resulted from circumstances—such as annexation or colonization—that are no longer tolerated by modern international law, or are based on considerations that run counter to the principles of contemporary international law, they may nevertheless provide arguments *a contrario*. Here again, however, uncertainty may prevail because—as a result of circumstances peculiar to a given situation—the historical precedent invoked may have involved solutions relating to public debts that would be deemed acceptable today.

82. Historical circumstances also come into play in another respect: when the territorial change results from peaceful development, it is normal that succession to debts should follow rules other than those applying when such a change results from the use of force. The "force" factor, however, is in no way limited to open hostilities. The ratio of forces between the various States or territorial areas is bound to influence the solution adopted. The Special Rapporteur will revert to this aspect of the problem later.

83. The ratio of forces may also be determined by a "weakness", namely, the insolvency of the State. There are many historical precedents for solutions based on the idea that it is preferable for the "second" debtor to pay, although in principle another party is legally responsible. Thus the practical solutions adopted with regard to succession are greatly influenced by considerations of expediency that may be explained only by the forces or interests involved.

4. Non-compliance with treaties

84. The analysis is complicated by yet another factor: in many cases, treaties providing for succession to public debts have not been complied with by the successor State.

For example, under the Treaty of Berlin of 13 April 1878, [58] Bulgaria, Serbia and Montenegro were made responsible for part of the Turkish debt on the basis of an equitable apportionment. In fact, however, they never paid their part, since Turkey was not strong enough to demand implementation of the treaty and the European Powers were not sufficiently united to impose the apportionment of the debt.

85. The Netherlands-Indonesian Round Table Conference Agreement, signed at The Hague on 2 November 1949, [59] established the principles and procedures for the apportionment of the Netherlands debt between the Netherlands and Indonesia when the latter became independent. However, in February 1956 the Indonesian Government denounced the agreements, thereby repudiating most of its debts to the Netherlands. [60]

86. Similarly, following Guinea's refusal in 1958 to join the Community, financial relations between France and the newly independent State were broken off and Guinea virtually stopped servicing the loans of the former colony to which it had succeeded. [61]

Many examples of non-compliance with treaties could be cited, such as the cases of the German and Austrian debts after the peace treaties of 1919 and the debts of Yemen, Albania and the Hejaz in the context of the Treaty of Lausanne of 1923.

87. That treaties providing for succession to public debts are not always complied with is not surprising given the circumstances in which they are concluded. Often the "free consent" of the successor State to assume part of the debt of the predecessor State is a mere fiction. In reality, many of these treaties are imposed upon the successor States, thereby making them involuntary debtors. It will be observed that the treaties in these cases often place exceptionally heavy burdens on States, thus going beyond the generally accepted principles of succession. [62]

88. In other cases, the question of compliance with a treaty does not arise because the attitude of a given successor simply precludes any solution in treaty form. However, it cannot always be said, in such cases, that the State in question has failed to abide by the principles of international law in respect to succession to public debts.

5. The interests involved [63]

89. The interests relating to succession to public debts are especially complex. In the case of the transfer of

[58] Articles 9, 33 and 42 of the Treaty of Berlin. Case cited by Rousseau, *op. cit.*, p. 436, and A. Andréadès, "Les obligations financières, envers la dette publique ottomane, des provinces détachées de l'Empire turc depuis le traité de Berlin", *Revue générale de droit international public*, vol. XV (Paris, Nov.-Dec. 1908), No. 6, pp. 585-601.

[59] See below, paras. 304 *et seq.*, and foot-note 230. See also France, Présidence du Conseil et Ministère des affaires étrangères, *La documentation française—Notes et études documentaires* (Paris, 16 September 1950), No. 1.380, pp. 17 and 18.

[60] See foot-note 232 below.

[61] See Bardonnet, *op. cit.*, p. 646 and references.

[62] See para. 379 below.

[63] See Jèze, "Les défaillances d'Etat", *loc. cit.*, pp. 377-435; and International Law Association, *op. cit.*, pp. 107 and 108.

part of the territory of a State, the interests of the territorially diminished State incline at first towards a refusal to pay not only the debts relating to the part of the territory it has lost, but even a part of the general debts proportionate to the size of the territory lost. Its interest lies in having payment made by its successor in the exercise of sovereignty over the separated territory. It is especially important to it not to be crushed by the burden of debts for which it remains responsible after the territorial change. However, since it also has an interest in preserving its credit, it does not go so far as to repudiate debts for which it can unquestionably be held responsible in accordance with the principles of international law.

90. The taxpayers of the detached territory, on the other hand, have an interest in not being held responsible for debts from which they have not benefited. Willingness to succeed to public debts will therefore be limited by this consideration. Furthermore, the taxpayers of the successor State other than those living in the part of territory that has been joined to it will share the interests of the taxpayers of the ceded territory. In both cases, however, the successor State may take account of the importance of not losing its external credit and good name.

91. A change of debtor may also affect the interests of the creditor third State. A "personal equation" or *intuitus personae* existed between the debtor State and the creditor third State that ceases with the change of debtor. Again, State succession may further strengthen the interest of the creditor third State by shifting responsibility for the debt from an impecunious or unwilling predecessor State to a successor State that is richer or more favourably disposed. A complication arises, however, when the creditor State and the successor State are the same. The identity of the debtor State is more important for private creditors, who do not always have the means to institute proceedings against the debtor State. Their interest therefore inclines towards an attempt to lay down rules to facilitate such proceedings, if the debts involved are legitimate and merit such protection.

92. Finally, the interest of the international community must be taken into account. This interest assumes effective form when it becomes that of an international organization or of an international financial agency such as IBRD. [64] Furthermore, a sound international legal order requires that debts should be paid by the responsible party, and to the exact extent of its responsibility, in accordance with the principles of international law. As always, however, the demands of justice are counterbalanced by considerations of equity; the international community can have no interest in destroying a State simply because it should discharge its debts. [65] As in civil law, under which imprisonment for debt has been abolished, logical arguments reinforce moral ones: the ruin of a State is the surest means of making payment of its debts impossible. There is therefore a general interest in seeing that the debtor State remains "viable".

93. One of the purposes of law is to reconcile conflicting interests. This means that the debtor may not ignore a debt for which he is responsible and the creditor may not forget that any military intervention to secure the servicing of loans is illegal. For many reasons, that vary with the political perspective from which they are viewed, international law has created a legal order without means of enforcement. It is therefore rather difficult to recognize a principle of succession to State debts as a rule of law.

F. Recapitulation of the text of the draft article proposed in this chapter

Article O. Definition of State debt

For the purposes of the present articles, State debt means a financial obligation contracted by the central government of a State and chargeable to the treasury of that State.

[64] See International Law Association, *op. cit.*, p. 107.

[65] See J. Lescure, "Faut-il détruire la Turquie?", *Revue politique et parlementaire*, vol. 103 (Paris, April-June 1920), p. 42.

Chapter II

Problem of the third State

A. Definition of the third State

94. The Special Rapporteur earlier devoted a number of articles, including one containing a definition, to the question of the third State in the context of State succession in respect of State property. He noted, in that connexion, that:

> a third State is thus neither the State which cedes nor the State which succeeds. It is neither the State which undergoes a [territorial] change nor the beneficiary of the change. It is the State which, by virtue of having previously established a patrimonial relationship with the predecessor State, is affected by the succession of States. [66]

The International Law Commission, agreeing with the Special Rapporteur, defined the third State as follows:

Article 3. Use of terms

[For the purposes of the present articles:

...

(*e*) "Third State" means any State other than the predecessor State or successor State.] [67]

95. As the Commission points out, this definition is the simplest and clearest for the whole question of succession of States in respect of matters other than treaties. It is valid for succession both to State property and to State debts, and the Special Rapporteur will accordingly use it here.

[66] *Yearbook... 1974*, vol. II (Part One), p. 100, document A/CN.4/282, chap. IV, art. X, para. 7 of commentary.

[67] *Yearbook... 1975*, vol. II, p. 110, document A/10010/Rev.1, chap. III, sect. B.

B. Creation of a legal relationship exclusively between the predecessor State and the successor State as a result of State succession

96. It has to be determined in what capacity the third State is of concern to this study. It certainly does not concern it as a debtor. If that State is a debtor of the successor State, State succession, being extraneous to that patrimonial relationship, clearly has no effect on it. If it is a debtor of the predecessor State, that means that the latter has a debt-claim against it that constitutes "State property". This question has already been considered in the context of State succession to State property; hence the present study relates to the third State only in its capacity as a *creditor State.* [68] But whose creditor? The third State may be a creditor of the successor State; in that case, the resulting relationship has no relevance to State succession. In the final analysis, the territorial change concerns the status of the third State *as a creditor of the predecessor State.*

97. In the part of the draft articles dealing with State succession as it relates to State property, the Commission has already adopted a text protecting the property—and therefore the debt-claims—of a third State from any "disturbance" resulting from the territorial change. The Commission decided:

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]. [69]

98. If article X above were to be narrowly interpreted, it could be said to relate only to tangible property, land, buildings, consulates and possibly bank deposits (these are referred to in paragraph 3 of the commentary on article X) which may be located, under article X, in the territory of the successor (or predecessor) State. No restriction was placed on the phrase "property, rights and interests" of the third State so that third State debt-claims, constituting intangible property whose location might be difficult to determine, could be excluded. If, then, article X were taken to refer also to the debt-claims of the third State, that would mean that the debts of the predecessor State, corresponding to those debt-claims, could in no way be affected by State succession. It would thus be wholly impossible and useless to study the general problem of State succession in respect of debts, since a strict *status quo* must apply to the debts of the predecessor State (which are no more than the debt-claims of the third State), a position that could not be modified by State succession.

99. What article X really means is that the debt-claims of the third State must not cease to exist or suffer from territorial change. Prior to State succession, the debtor State and the creditor State were linked by a specific, legal debtor-creditor relationship. The problem, then, is whether succession of States is, in this case, intended not only: (1) to create and establish a legal relationship between the debtor predecessor State and the successor State, enabling the former to shift to the latter all or part of its obligation to the creditor third State, but also (2) to create and establish a new "successor State/third State" legal relationship to replace the "predecessor State/third State" relationship in the proportion indicated by the "predecessor State/successor State" relationship with respect to assumption of the obligation.

100. The answer is that *succession of States in respect of State debts can create a relationship between the predecessor State and the successor State with regard to debts that bound the former to a third State, but that it cannot, of itself, establish any direct legal relationship between the creditor third State and the successor State should the latter "assume" the debt of its predecessor.*

From this point of view, the problem of State succession in respect of debts is much more akin to that of State succession *in respect of treaties* than to that of succession in respect of property.

101. Considering here only the question of the transfer of obligations and not that of the transfer of rights, there are certainly grounds for stating that "succession of States", in the strict sense, takes place only when, by reason of a territorial change, certain international obligations of the predecessor State to third parties are transferred to the successor State solely by virtue of a rule of international law providing for such transfer, independently of any manifestation of will on the part of the predecessor State or the successor State. But the effect, *in itself*, of State succession should stop there. A new legal relationship is established between the predecessor State and the successor State with regard to the obligation in question. However, the existence of this relationship does not have the effect either of automatically extinguishing the former "predecessor State/third State" relationship [except where the predecessor State entirely ceases to exist], or of replacing it by a new "successor State/third State" relationship in respect of the obligation in question.

102. If, then, it may be concluded that there is a "transfer" (*transmission*) [70] of the debt to the successor State (the manner of which it is the main purpose of succession of States to determine), it cannot be argued that it must

[68] The Special Rapporteur does not intend to go into this point in detail at this stage. The third State may itself have State debt-claims against the predecessor State. However, another case is that of individuals or bodies corporate, private or public, other than the State, having debt-claims in the third State against the predecessor State. Such creditors are nationals of the third State. The "State debt" of the predecessor State has of course been defined as such, with the attribute "State", by reference to the debtor. There is a "State debt" of the predecessor State even if the creditor is a foreign private person; it is enough for that debt to have been contracted by the government of the predecessor State.

Similarly, the Special Rapporteur is confining his discussion here to the case of a *thid State*, although he is fully aware that the predecessor State may be the debtor of an international organization or international financial agency. A case that comes immediately to mind is that of IBRD.

[69] *Yearbook... 1975*, vol. II, p. 110, document A/10010/Rev.1, chap. III, sect. B.

[70] The term is not really appropriate.

automatically have effects in relation to the creditor third State in addition to the normal effects it will have vis-à-vis the predecessor State. In other words, article 6 of the draft cannot be applied in respect of debts. It will be remembered that this article read as follows:

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. [71]

It would be rash to assert, on the dangerous ground of parallelism, that an article of the same kind would be correct in the case of debts. A clause would have to be added indicating that novation occurs only in the legal relationship between the successor State and the predecessor State. Such an article could read as follows:

Article R. Obligations of the successor State in respect of State debts passing to it

In the relations between the predecessor State and the successor State, a succession of States entails the extinctiou of the obligations of the predecessor State and the arising of the obligations of the successor State in respect of such State debts as pass to the successor State in accordance with the provisions of the present articles.

As in the case of succession of States in respect of treaties, a *personal equation* is involved in the matter of succession to State debts. The legal relationship that existed between the creditor third State and the predecessor State cannot undergo a twofold novation, in a triangular relationship, which would have the effect of establishing a direct relationship between the successor State and the third State.

103. The problem is not a theoretical one, and its implications are important. In the first place, if the successor State is to assume part of the debt of the predecessor State, in practice this often means that it will pay its share to the *predecessor State*, which will be responsible for discharging the debt to the creditor third State. The predecessor State thus retains its debtor status and full responsibility for the old debt. This has frequently occurred, if only for practical reasons, the debt of the predecessor State having led to the issue of bonds signed by that State. For the successor State to be able to honour those bonds directly, it would have to endorse them; until that operation—which constitutes novation in legal relations—has taken place, the predecessor State remains liable to the creditors for the whole of its debt. Nor is this true only in cases where the territorial loss is minimal and where the predecessor State is bound to continue servicing the whole of the old debt. Moreover, if the successor State defaults, the predecessor State remains responsible to the creditor third State for the entire debt until an express novation has taken place to link the successor State specifically and directly to the third State.

104. In the opinion of the Special Rapporteur, some of the most able writers seem to be in error on this point. Alexandre Sack, for example, formulated such "rules" as the following:

No part of an indebted territory is bound to assume or pay a larger share than that for which it is responsible. If the government of one of the territories refuses to assume, or does not actually pay, the part of the old debt for which it is responsible, there is no obligation on other cessionary and successor States or on the diminished former State to pay the share for which that territory is responsible.

This rule leaves no doubt concerning cessionaries and successors that are sovereign and independent States; they cannot be required to guarantee jointly the payments for which each of them and the diminished former State (if it exists) are responsible, nor to assume any part of the debt which one of them refuses to assume.

However, the following question then arises: is the former State, if it still exists and if only part of its territory has been detached, also released from such an obligation?

...

The argument that the diminished "former" State remains the principal debtor vis-à-vis the creditors and, as such, has a right of recourse against the cessionary and successor States is based on [an erroneous] conception [according to which] the principle of succession to debts is based on the relations of States among themselves ...

...

Thus, in principle, the diminished former State has the right to consider itself responsible only for that part of the old debt for which it is responsible in proportion to its contributive capacity.

...

The creditors have no right of recourse (or right to take legal action) either against the diminished former State as regards those parts of the old debt for which the ... successors are responsible or against one of the ... successors as regards those parts of the old debt for which another ... successor or the diminished former State is responsible.

... The debtor States have the right to apportion among all the indebted territories what was formerly their common debt. This right belongs to them independently of the consent of the creditors. They are therefore bound to pay to the creditors only that part of the old debt for which each of them is responsible. [72]

105. These various "rules" do not appear acceptable as long as the creditor third State has not consented to substitution of the debtor. The analysis made by Gaston Jèze is much more convincing: [73]

If the annexation *is not total*, if there is *partial* dismemberment, the matter cannot be in doubt: after annexation, as before, bondholders have only one *creditor*, namely, the State that floated the loan ... *Apportionment of the debt between the successor State and the dismembered State* * does not have the immediate effect of automatically making the successor State the *direct* debtor vis-à-vis the holders of bonds issued by the dismembered State. To use legal terms, the creditors' *right to institute proceedings* remains the same as it was before dismemberment; only the *contribution* * of the successor State and of the dismembered State is affected: it is a legal relationship *between States*.

...

... Annexation or dismemberment does not *automatically* result in *novation through a change of debtor*.

In practice, it is desirable, *for the sake of all the interests involved*, that the creditors should have as the *direct* debtor the *real* and

[71] *Yearbook... 1975*, vol. II, p. 110, document A/10010/Rev.1, chap. III, sect. B.

[72] A. N. Sack, "La succession aux dettes publiques d'Etats", *loc. cit.*, pp. 304, 306 and 320.

[73] Jèze is discussing the case of the transfer of part of a territory, whereas Sack was referring to the case of the separation of several parts of territory and the establishment of as many States. However, the type of succession is of little relevance here.

principal debtor. Treaties concerning cession, annexation or dismemberment should therefore settle this question. In fact, that is what usually occurs.

...

In case of *partial* dismemberment, and when the portion of the debt assumed by the annexing State is small, the *principal* and *real* debtor is the dismembered State. It is therefore preferable not to alter the debt but to leave the dismembered State as the *sole debtor* to the holders of the bonds representing the debt. The annexing State will pay its contribution to the dismembered State and the latter *alone* will be responsible for servicing the debt (interest and amortization), *just as before the dismemberment.*

The contribution of the annexing State will be paid by the latter in the form either of a *periodic payment* ... or of a one-time capital payment. [74]

C. Conditions for novation in the legal relationship with the third State

1. Effects of the transfer of debts with regard to a creditor third State

106. The creditor third State and the debtor predecessor State set out their relationship in a treaty. What is to become of that treaty and thus of the debt to which it gave rise may have been decided in a "devolution agreement" concluded between the predecessor State and the successor State. But the creditor third State may prefer to remain linked to the predecessor State, even though the latter is diminished, if it considers that State more solvent than the successor State. In consequence of its debt-claim, the third State possesses a right that the predecessor State and the successor State cannot dispose of at their discretion in their agreement. The general rules of international law concerning treaties and third States—namely, articles 34 to 36 of the Vienna Convention on the Law of Treaties [75]—quite naturally apply in this case. It must, of course, be recognized that the agreement between the predecessor State and the successor State concerning the "transfer" of a State debt from one to the other is not in principle designed to be detrimental to the creditor third State, but rather to ensure the maintenance of the debt contracted with that State.

107. However, as the Commission observed in connexion with devolution agreements, in the case of succession of States in respect of treaties,

> the language of devolution agreements does not normally admit of their being interpreted as being intended to be the means of establishing obligations or rights for third States. According to their terms they deal simply with the transfer of the treaty obligations and rights of the predecessor to the successor State.
>
> A devolution agreement has then to be viewed, in conformity with the apparent intention of its parties, as a purported *assignment by the predecessor to the successor State of the former's obligations and rights under treaties previously having application to the territory.** It is, however, extremely doubtful whether such a purported assignment by itself changes the legal position of any of the interested States. The Vienna Convention contains no provisions regarding the assignment either of treaty rights or of treaty obligations. The reason is that the institution of "assignment" found in some national systems of law by which, under certain conditions, contract rights may be transferred without the consent of the other party to the contract does not appear to be an institution recognized in international law. In international law the rule seems clear that an agreement by a party to a treaty to assign either its obligations or its rights under the treaty cannot bind any other party to the treaty without the latter's consent. Accordingly, a devolution agreement is in principle ineffective by itself to pass either treaty obligations or treaty rights of the predecessor to the successor State. It is an instrument which, as a treaty, can be binding only as between the predecessor and successor States and the direct legal effects of which are necessarily confined to them.
>
> ...
>
> ... That devolution agreements, if valid, do constitute at any rate a general expression of the successor State's willingness to continue the predecessor State's treaties applicable to the territory would seem to be clear. The critical question is whether a devolution agreement constitutes something more, namely an *offer* to continue the predecessor State's treaties which a third State, party to one of those treaties, may accept and by that acceptance alone bind the successor State to continue the treaties ... [76]

108. Accordingly, the Special Rapporteur is of the opinion that the draft articles on succession of States in respect of State debts should include a provision along the following lines:

Article S. Effects of the transfer of debts with regard to a creditor third State

State debts or fractions of State debts which, pursuant to the present articles or to agreements concluded between the predecessor and successor States, pass from the former to the latter do not, at the date of the succession of States and in consequence only of such transfer, become debts of the successor State vis-à-vis the creditor third State.

109. This means that:

(*a*) Although State succession has the effect of permitting the debt of the predecessor State to be apportioned between that State and the successor State, or to be assumed in its entirety by either of them, it does not, of itself, have the effect of binding the creditor third State;

(*b*) The creditor third State must in some way express its consent to the assignment of debts from the predecessor to the successor State; in other words, succession of States does not, *of itself*, have the effect of automatically releasing the predecessor State from the State debt (or the fraction of it) assumed by the successor State without the consent, express or tacit, of the creditor third State;

(*c*) Succession of States does not, of and by itself, have the effect of giving the creditor third State an established claim equal to the amount of the State debt transferred to the successor State; in other words, the creditor third State does not, in consequence only of State succession, have a right of recourse or a right to take legal action against the State that succeeds to the debt.

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[74] Jèze, "L'emprunt dans les rapports internationaux ...", *loc. cit.*, pp. 67-69. Jèze also quotes A. de Lapradelle and N. Politis, *Recueil des arbitrages internationaux* (Paris, Pédone, 1905), vol. I, p. 287.

[75] For the text of the Convention, see *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 288.

[76] *Yearbook... 1974*, vol. II (Part One), p. 184, document A/9610/Rev.1, chap. II, sect. D, art. 8, paras. 5, 6 and 11 of the commentary.

2. EFFECTS, WITH REGARD TO A CREDITOR THIRD STATE, OF A UNILATERAL DECLARATION BY THE SUCCESSOR STATE THAT IT ASSUMES THE DEBTS OF THE PREDECESSOR STATE

110. Does a unilateral declaration by the successor State that it assumes all or part of the debts of the predecessor State following a territorial change mean, *ipso facto*, novation in the legal relationship previously established by treaty between the creditor third State and the debtor predecessor State? Such a declaration is unquestionably to the advantage of the predecessor State, and it would be surprising and unexpected if that State were to find some objection to it, since it has the practical effect of easing its debt burden. It is also, at least in principle, to the advantage of the creditor third State, which might have feared that all or part of its debt-claim would be jeopardized by the territorial change.

111. The creditor third State might, however, have a political or material interest in refusing to agree to a substitution of the debtor or to assignment of the debt. In any case, under most national systems of law the assignment of debts is generally impossible. The creditor State has a subjective right, which involves a large measure of *intuitus personae*. It may, in addition, have a major reason for refusing to agree to assignment of the debts, for example, if it considers that the successor State, by its unilateral declaration, has taken over too large—or too small—a share of the debts of the predecessor State, with the result that the declaration may jeopardize its interests in view of either the degree of solvency of one of the two States—the predecessor or the successor—or the nature of the relations of the third State with each of them, or for any other reason. More simply still, the third State cannot feel itself automatically bound by the unilateral declaration of the successor State, since that declaration might be challenged by the predecessor State with regard to the amount of the debts that the successor State has unilaterally decided to assume.

112. Thus a provision comparable *mutatis mutandis* to article 9 of the draft articles on succession of States in respect of treaties [77] might be considered here. It might be worded as follows:

Article T. Effects, with regard to a creditor third State, of a unilateral declaration by the successor State that it assumes the debts of the predecessor State

The debts of a predecessor State do not become, at the date of the succession of States, debts of the successor State in consequence only of the fact that the successor State has made a unilateral declaration by which it decides to assume responsibility for them.

3. CONSENT OF THE CREDITOR THIRD STATE AND ITS EFFECTS

113. It might also be useful to include a provision indicating the manner in which the creditor third State should express its consent to be bound by the agreement between the predecessor State and the successor State or by the unilateral declaration of the successor State concerning State debts assumed by the latter. The provision could also indicate the legal consequence of such consent, namely, the creation of a legal relationship—now a direct one—between the creditor third State and the successor State, which is the new debtor, regarding the debt that the latter has agreed or decided to assume.

114. Thus a draft article along the following lines could be included:

Article U. Expression and effects of the consent of the creditor third State

The consent of the creditor third State to be bound by an agreement concluded between the predecessor State and the successor State, or by a unilateral declaration by the successor State, concerning State debts in a succession of States can result from the intention expressed or conduct engaged in by the third State or from any formal or tacit act by that State.

Such consent entails, with regard to the creditor third State, the extinction of the obligations of the predecessor State and the arising of the obligations of the successor State in respect of such State debts as pass to the successor State.

D. Recapitulation of the text of the draft articles proposed in this chapter

[*Definition of the third State*

Article 3 of the draft articles on succession of States in respect of matters other than treaties:

Article 3. Use of terms

For the purposes of the present articles:

...

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

Article R. Obligations of the successor State in respect of State debts passing to it

In the relations between the predecessor State and the successor State, a succession of States entails the extinction of the obligations of the predecessor State and the arising of the obligations of the successor State in respect of such State debts as pass to the successor State in accordance with the provisions of the present articles.

Article S. Effects of the transfer of debts with regard to a creditor third State

State debts or fractions of State debts which, pursuant to the present articles or to agreements concluded between the predecessor and successor States, pass from the former to the latter do not, at the date of the succession of States and in consequence only of such transfer, become debts of the successor State vis-à-vis the creditor third State.

Article T. Effects, with regard to a creditor third State, of a unilateral declaration by the successor State that it assumes debts of the predecessor State

The debts of a predecessor State do not become, at the date of the succession of States, debts of the successor State in consequence only of the fact that the successor State has made a unilateral declaration by which it decides to assume responsibility for them.

Article U. Expression and effects of the consent of the creditor third State

The consent of the creditor third State to be bound by an agreement concluded between the predecessor State and the successor State, or

[77] *Ibid.*, p. 187, document A/9610/Rev.1, chap. II, sect. D.

by a unilateral declaration by the successor State, concerning State debts in a succession of States, can result from the intention expressed or conduct engaged in by the third State or from any formal or tacit act by that State.

Such consent entails, with regard to the creditor third State, the extinction of the obligations of the predecessor State and the arising of the obligations of the successor State in respect of such State debts as pass to the successor State.

CHAPTER III

Non-transferability of "odious debts"

115. The draft articles on succession of States in respect of State debts should include one or two provisions relating to what are generally called "odious debts" or "régime debts", in connexion with which the literature refers to the case of "war debts" and "subjugation debts".

116. It is generally recognized that historically the theory relating to these categories of debts has been developed in the writings of Anglo-American jurists, who have excluded them from all possible succession on the basis of moral principles. As will be seen, however, State practice in continental Europe, if not the writings of European jurists, has often stressed the primacy of this "clean slate" principle as regards these categories of debts, at least in the case of debts contracted between European States in order to make war on other European States. A definition of "odious debts" must be sought before the legal régime of these debts in the context of State succession can be determined.

A. Definition of "odious debts"

1. WAR DEBTS AND SUBJUGATION DEBTS

117. The definitions of odious, war or subjugation debts encountered by the Special Rapporteur are not very precise and it is not always clear whether they concern one category of such debts or all of them, so that even the classification of these debts in relation to each other seems uncertain. The Special Rapporteur has made a choice which he proposes to the Commission and which is apparent from the heading of this chapter. In his view, the term "odious debts" designates the genus, whereas "war debts" and "subjugation debts" constitute different species within that genus. In other words, odious debts represent a general category that includes distinct varieties such as war debts or subjugation debts, or conceivably still other types of debts.

118. Of course, all these cases involve State debts. By and large it may be said, provisionally, that "war debts" are those contracted by a State to sustain its war effort against another State, and "subjugation debts" are those contracted by a State with a view to subjugating a people and colonizing its territory.

119. Bustamante refers to

> debts contracted during a war of independence by the previous sovereign to cover the costs of that war ... It would be said in private law that the costs of a lawsuit cannot be imposed on the winning party, and in public law it cannot be claimed that one of the parties should assume the obligations engendered or created to prevent, directly or indirectly, its birth and its existence. [78]

Bustamente refers here to war debts. He also refers to

> public debts created by the former State before the war of independence and charged to its general treasury of the region that subsequently became independent, with the direct or indirect intention of maintaining or ensuring its domination and preventing the birth of a new State. [79]

In this case he refers to subjugation debts.

120. Fauchille, for his part, writes:

> Some writers—Oppenheim, for example—claim that, in the case of annexation following conquest, the transfer [of debts] must include even the obligations incurred for the purpose of the war that led to the conquest. But most writers exclude such debts from the transfer. Indeed, it would seem difficult to compel the acquiring State to assume responsibility for the debts which the ceding State contracted with a view to combating and defeating it; *war debts* are thus subject to a special régime. This view is upheld notably by Jèze, Lawrence and Westlake. We may place in the same category as war debts debts contracted in peacetime, but specially for the purpose of subjugating the liberated territory; such debts cannot be binding on the liberating State. [80]

121. The aforementioned writers are quoted not in order to indicate what becomes of such debts—a point that is not yet at issue—but only to explain what is generally meant by "war debts" and "subjugation debts". These two types of debt come under the general heading of "odious debts", which may provisionally be described simply as debts that run counter to the major interests of the transferred territory or of the successor State. There remains the case of debts that are often referred to as "régime debts".

2. RÉGIME DEBTS

122. Gaston Jèze drew a distinction between "régime debts" and State debts. In his view, State debts concerned the State as an abstract entity or as a legally organized nation. That organization received concrete expression in a complex of public services of general interest, irrespective of the political régime or ideological tendencies of the existing government. Jèze gradually came to consider even subjugation debts (in the case of the "Germanization" of Poland, for example) and war debts as régime debts. [81] "We should place on the same footing as war debts", he wrote, "... debts contracted in peacetime, but specially for the purpose of subjugating the liberated territory ... These are régime debts. [82] Hence State debts would be those contracted in normal times for the purpose of ensuring the regular operation

[78] Sánchez de Bustamante y Sirvén, *op. cit.*, pp. 293 and 294.

[79] *Ibid.*, p. 294.

[80] Fauchille, *op. cit.*, p. 352.

[81] Jèze, *Cours de science des finances ..., op. cit.*, pp. 302-205 and 327.

[82] *Ibid.*, p. 327.

of public services, whereas régime debts would be linked to the installation of a political régime and, more generally, to the idea of exceptional circumstances.

123. The distinction thus drawn by Gaston Jèze is irreproachable in the context of the internal order of the State, but is a source of confusion and difficulty in the international order. In the latter context, international law does not concern itself with the organs of government and still less with their political orientation, but only with the State of which they are the instrument. *From this standpoint, régime debts are also State debts* if they were contracted by an organ of government of the State in question. [83]

124. It should be noted that the case of "régime debts", in the strict sense of the term, is invoked much more frequently in succession of governments than in succession of States. The problem then arises following a change of political régime within a State, without any territorial change. In such cases, there is in fact no *change of identity or interruption of continuity for the debtor State.* It is the same State that consents—or does not consent—under a new government to assume the public debt previously contracted by it. The burden of that debt is borne by the same population in the same State. A famous case is that of the Tsarist public debt, for which the new régime resulting from the October Revolution of 1917 originally refused to assume responsibility. [84]

125. It is true, however, that the question of régime debts may arise even in cases of territorial change, that is, of succession of States; it is all a matter of terminology or definition. Moreover, these régime debts, if accepted by a new government (succession of governments), may subsequently be at the heart of a State succession if the extent of the territory of that government changes before the debts have been paid.

126. In short, what is decisive in the context of State succession is (*a*) to affirm that régime debts are unquestionably State debts, since international law recognizes only States, and (*b*) to observe that, in the final analysis, the notions of "odious debt" and "régime debt" overlap to a great extent. Each constitutes a general category, a "genus", in which are found "species" called war debts, subjugation debts and so on. The difference between régime debts and odious debts is that *the former are considered from the standpoint of the predecessor State* (whose political "régime" is involved), whereas *the latter are considered from the standpoint of the successor State* (for which this category of debts is "odious"). Régime debts and odious debts could thus be regarded as practically identical. However, the customary non-transferability of the latter, which denotes repudiation on the part of the successor State, requires that they be viewed from the standpoint of that State and justifies a preference for the use of the term "odious debt".

127. If a more substantial distinction really has to be made between odious debts and régime debts, it may be said that *all odious debts are régime debts, whereas not all régime debts are odious debts.* The hypothetical case may be posited of a régime debt such as a war debt contracted by State A in a conflict with State B. If State A subsequently undergoes a territorial change—for example, by uniting with State C—successor State D, created by the uniting of States A and C, will probably not be reluctant to assume the war debt contracted by State A when the latter was at war with State B. It will be all the less reluctant because a uniting of States is involved; in other words, this is an instance of peaceful succession of States desired by the two States wishing to unite. In this case, it may be seen that the successor State assumes the debt because the war was not directed against it but took place between the predecessor State and a third State. It is a debt that was not odious to the successor State.

128. In this sense, the category of odious (strictly non-transferable) debts is clearly somewhat narrower than that of régime debts (a part of which may be assumed by the successor State if they were not contracted against its major interests). This is an element that should be taken into account in defining an odious debt.

3. Definition of an odious debt

129. Two important points may be singled out to clarify the definition of the term "odious debt":

(*a*) From the standpoint of the successor State, an odious debt could be taken to mean a State debt contracted by the predecessor State to serve purposes contrary to the major interests of either the successor State or the territory that has been transferred to it;

(*b*) From the standpoint of the international community, an odious debt could be taken to mean any debt contracted for purposes that are not in conformity with contemporary international law and, in particular, the principles of international law embodied in the Charter of the United Nations.

(a) *Borrowed funds used against the major interests of the successor State or of the transferred territory*

130. The Special Rapporteur is referring here to the problem of major interests injured by the predecessor State. A thorough examination will, of course, reveal that almost any political, economic or social action by a State may be disadvantageous to another State. A debt contracted by a State for the purpose of carrying out the political, economic or social action in question does not, however, become an "odious debt" for another State unless the latter's interests are gravely or substantially injured. This is a matter that borders on the problem of State responsibility. If the debt was contracted by a State for the purpose of committing a wrongful act against another State, the position is clear:

[83] See para. 46 above.

[84] The French Third Republic acknowledged a war debt incurred by revolutionary France. A debt contracted in 1797 by Bonaparte (who was not in fact at the time an official organ of the French Government) was later acknowledged at the request of a family of French origin named Thierry, then living in Venice. The family had agreed to transfer 60 million gold francs to Bonaparte in 1797 to equip his army in Italy. In 1938 the Daladier government acknowledged that debt, through the French Embassy in Berlin, as being due to the family, which had become Tirrier and was living in Essen. Today, the debt would amount to the equivalent of 12 billion Deutsche marks.

the other State, if it becomes a successor State, will not acknowledge the debt. However, there may be cases in which, even if no wrongful act is committed, a State's action can be injurious to another State.

131. The hypothetical case may be taken of two neighbouring States, each fearing the other because of a territorial dispute, that embark on a particularly ruinous arms race and incur heavy debts for the purpose. However, the territorial dispute is finally settled by peaceful means and part of the territory of one State is transferred to the other. Substantial defence works have been constructed in that part of territory with borrowed funds. The successor State would certainly regard as an "odious debt" the debt contracted by the predecessor State during the arms race.

132. It is also necessary to identify the cases where debts are contracted that might be called "suspect debts". For instance, it may happen that a State, believing that annexation is imminent, contracts debts without adequate compensation for the sole purpose of embarrassing the successor State or the population of the territory concerned. [85]

(b) *Debts contracted for purposes recognized as wrongful in international law*

133. A straightforward case is that of a debt contracted with the intention of using the funds to violate treaty obligations. However, this problem derives its complexity from another source. The question of "odious debts" in a case of State succession arises today in terms of contemporary legal ethics, in connexion on the one hand with human rights and the right of peoples to self-determination and, on the other hand, with the unlawfulness of recourse to war.

134. If, for example, the predecessor State contracted a debt in order to purchase arms that were used to flout human rights through genocide, racial discrimination or *apartheid*, the successor State must consider this debt as odious even if its own population or that of the territory ceded to it did not directly suffer from those policies. The successor State should not assume any part of the general debt of the predecessor State corresponding to such arms purchases.

135. Similarly, if the predecessor State contracted debts intended to finance a policy of subjugating a people and colonizing its territory or, in general, any policy contrary to the right of peoples to self-determination, such debts will be odious in the eyes of the international community. If there is subsequently a succession of States—for example a transfer of a part of a teritory from one State to another—the successor State, even if it was not a victim of that policy, will not have to accept any part of these specific debts in the general debt of the predecessor State. The same holds true, for even greater reason, if the successor State or the territory transferred to it have themselves suffered from such a policy on the part of the predecessor State.

136. The question of odious debts also arises in terms of the unlawfulness of recourse to war in contemporary international law. Debts contracted by a State in order to wage a war of aggression are clearly odious debts. A distinction, however, should be made between two different cases. The first concerns irregularity in State succession as a whole, when brought about by force. The second concerns only irregularity of the debt, the problem of the assumption of which arising later in the context of another—regular—State succession.

137. The first point has been covered, since the codification work undertaken by the Commission concerns only situations "occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations". [86] Thus, not only should be debts of a war of aggression not be assumed by the successor State, but the succession of States itself has no legal existence. (The problem of what becomes of the debts of a war of aggression could in fact arise in this case only if the aggressor State were vanquished, which is possible, and lost some of its territory, which is irregular, since the State that is the victim of aggression and that emerges victorious does not have the right to expand its territory. Annexation remains prohibited even after the exercise of the right of self-defence. In the past, States that successfully resisted a war of aggression took a part of territory from the vanquished aggressor, thus giving rise to a succession of States. This still occurs, and writers take such cases as the basis for determining what becomes of debts incurred in connexion with a war of aggression that proved unsuccessful but nevertheless gave rise to State succession.) The problem should therefore not arise and there should be no subject-matter for succession of States, since there should not even be a succession.

138. If States wish to respect international law only the second hypothesis should be considered. In this case, State A would have contracted debts to wage its war of aggression against State B. According to the letter of the law, their war should not give rise to a regular territorial change and succession of States. There is thus no need to be concerned about what becomes of the war debts, any more than about any other subject-matter of succession. Subsequently, however, and before the war debts of State A have been paid, a regular succession of States occurs between State A and State C. It is then necessary to determine what happens to the war debts of State A vis-à-vis State C. Since aggression was committed, the debts that made that wrongful act possible cannot be transferred to State C, not so much because these war debts of State A served to advance designs contrary to the interests of State C as because they enabled State A to violate an imperative legal obligation of non-recourse to war, which is harmful to the international community.

[85] E. H. Feilchenfeld, *Public Debts and State Succession* (New York, Macmillan, 1931), p. 718.

[86] See *Yearbook... 1974*, vol. II (Part One), p. 181, document A/9610/Rev.1, chap. II, sect. D, draft articles on succession of States in respect of treaties, art. 6; and *Yearbook... 1975*, vol. II, p. 110, document A/10010/Rev.1, chap. III, sect. B, draft articles on succession of States in respect of matters other than treaties, art. 2.

139. The reality, however, is different. It is between State A and State B that State succession occurs as a result of a territorial change to the benefit of State B, which has vanquished its aggressor. The successor State (B) will be unwilling to honour the war debts of the predecessor State (A). The examples drawn from State practice refer mainly to such a case.

140. To sum up, the Special Rapporteur proposes a definition of odious debts that could take the following form:

Article C. Definition of odious debts

For the purposes of the present articles, "odious debts" means:

(*a*) all debts contracted by the predecessor State with a view to attaining objectives contrary to the major interests of the successor State or of the transferred territory;

(*b*) all debts contracted by the predecessor State with an aim and for a purpose not in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations.

B. Determination of the treatment of odious debts

1. War debts

141. A perusal of nineteenth century legal literature shows that it was fully agreed that the successor State should be relieved of responsibility for any debt contracted by the predecessor State to sustain its war effort against the former, since it was inconceivable that a people who had freed themselves from the political sovereignty of a State by victorious resistance should be required, after their victory, to pay the debts contracted by the State that had waged war upon them to keep them under its sovereignty. The practice of States was very soon orientated towards this just and sensible solution. However, there have also been contrary examples.

(a) *Rejection of war debts according to State practice*

142. Eighteenth and nineteenth century treaties provided for the rejection by the successor State of the war debts of the predecessor State. The Treaty of Campo Formio of 17 October 1797 between France and the Emperor of Austria, [87] the Treaty of Tilsit of 9 July 1807 between France and Prussia [88] and the Treaty of Vienna of 30 October 1864 between Denmark on the one hand and Prussia and Austria on the other hand [89] are examples.

Article 24 of the Treaty of Tilsit stipulated that:

Any *debts, obligations and promises* * which His Majesty the King of Prussia might have previously assumed or contracted, *prior* * to the present war, on territories, properties or revenues which His said Majesty cedes or renounces under the present Treaty, shall revert to the new possessors, who shall undertake these obligations without reserves, exceptions or restrictions.

Feilchenfeld considers "debts contracted *during* * the war between France and Prussia" [90] as thus excluded. The same was true of the other treaties cited.

143. A quite well known case in State practice is that of the treatment of South Africa's war debts at the time of the annexation of the *Transvaal* by Great Britain in 1900. The Commander-in-Chief of the British armed forces, Field Marshal Roberts, had stated on 6 June and 17 July 1900 that Great Britain refused to assume the war debts contracted under Law No. 1 of 1900 by the South African Republic. [91] The Crown Counsel, R. B. Finlay and E. Carson, came to the same conclusion on 30 November 1900 in the opinion they presented to the Colonial Office:

We think that obligations incurred during the war, or in contemplation of the war, stand upon a different footing, and we do not know of any principle of international law which would oblige Her Majesty's Government to recognize such obligations. [92]

144. It will be noted that, in the case of the Netherlands South African Railway Company, the report of the Transvaal Concession Commission [93] reached the same conclusion in reaffirming that, in any event and in general, an annexing State was not legally bound by the obligations of the predecessor State. That position reflected a fairly consistent British position at the time and was also stated, for instance, by Lord Robert Cecil in his argument in the well known case of the *West Rand Central Gold Mining Company Limited* v. *the King*. [94]

145. The problem of non-succession to war debts came to the fore again after the First World War, and attempts were made to resolve it. The major treaties ending the war confirmed the principle of the rejection of war debts by the successor State.

146. It follows *a contrario* from article 254 of the Treaty of Versailles of 28 June 1919 [95] that the war debts of the German Empire did not have to be assumed by the successor States. Indeed, only German public debts contracted prior to 1 August 1914, the date of the outbreak of war, were assumed by the successor States in the manner specified in article 254 of the Treaty. Professor Charles Rousseau writes in this connexion that "the Treaty of Versailles in fact carried this principle very far, since it exempted Denmark, to which Schleswig was ceded, from any contribution to the war debts, although it had been legally neutral from 1914 to 1918". [96]

147. The other peace treaties excluded from the apportionment of debts all debts contracted by the predecessor State to sustain its war effort. [97] Thus the Treaty of Lausanne excluded debts subsequent to 17 October 1912, [98] the treaties of Saint-Germain and Trianon those con-

[87] Art. 4.

[88] Art. 24 (G. F. de Martens, ed., *Recueil de traités* (Göttingen, Dieterich, 1835), vol. VIII, p. 666). See also the treaty of 11 April 1811 between Prussia and Westphalia, art. 13.

[89] Art. XII. In 1875, however, Prussia, of its own accord, paid a compensation of 4.5 million marks.

[90] Feilchenfield, *op. cit.*, p. 91.

[91] *Ibid.*, p. 394, foot-note 102.

[92] Bardonnet, *op. cit.*, p. 280, foot-note 58.

[93] Also referred to as the report of the Lyttleton Commission of 19 April 1901, and as the British Blue Book of 12 June 1901.

[94] *British International Law Cases* (London, Stevens, 1965), vol. 2, p. 283.

[95] *British and Foreign State Papers* (London, H.M. Stationery Office, 1922), vol. 112, pp. 124 and 125.

[96] Rousseau, *op. cit.*, p. 462.

[97] See Feilchenfeld, *op. cit.*, p. 450, para. 213.

[98] Treaty of Lausanne, of 24 July 1923, art. 50 (League of Nations, *Treaty Series*, vol. XXVIII, pp. 41 and 33).

tracted after 28 July 1914, [99] and the Treaty of Neuilly those subsequent to 11 October 1915. [100] The latter treaty (article 141, second para.) stated that the debt to be apportioned would be determined by fixing "the amount of the Bulgarian public debt on the 11th October 1915, taking into account *only such portion of the debt contracted after the 1st August, 1914, as was not employed by Bulgaria in preparing the war of aggression* *".

148. These solutions in the peace treaties were not achieved without difficulty. The Central Powers protested against them. Hungary argued that the differentiation of debts according to their origin was devoid of any basis in international law. Germany asserted that it was unjust to leave it to the vanquished population remaining under its sovereignty after the various cessions of territory to bear the burden of the war debts alone, since during the period of hostilities the entire population including that of the ceded territories, had been responsible for the war and had played an equal part in it. Austria and Turkey pointed out that the ex-enemy successor States were not the same as the Powers that had gone to war in 1914 at the side of the Allies.

149. Taking account, therefore, of the crushing financial burden weighing on Austria, for example, after the First World War, political solutions departed from recognized legal principles; it was thus that the Czechoslovak Government agreed, for political reasons, to pay 33 per cent of the Austrian war loans subscribed in its territory.

150. It should be noted that the peace treaties that wound up the First World War gave a very broad *extension* to the notion of "war debt" by treating as such any debt contracted *during* the war. Recognition was thereby given to the irrebuttable presumption based on the date of the loans. For instance, a loan contracted by Germany in 1917 for the construction of a bridge at Teschen in Upper Silesia was regarded by the German Reparations Commission as a war loan simply because of the date on which it was contracted.

151. The treaties ending the Second World War followed the same lines as the 1919 treaties with respect to the rejection of "war debts" by the successor States. This solution is implicit, for example, in the Treaty of Peace with Italy of 10 February 1947. [101]

152. Moreover, the Franco-Italian Conciliation Commission established under that treaty ruled that:

> debts contracted by the ceding State *for war purposes* *, or for the purpose of expanding a territory which was first annexed and subsequently liberated, cannot bind the successor or restored State. It is inconceivable that Ethiopia should have to assume the burden of expenses incurred by Italy in order to ensure its domination over Ethiopian territory. [102]

(b) *Assumption of war debts according to State practice*

153. It was noted above [103] that, after the First World War, Czechoslovakia decided, for political reasons, to assume up to 33 per cent of the Austrian war debts. Going further back in time it may be found, for example, that the Treaty of Ryswick, which established the "peace of Westphalia", did not exclude war debts from succession, or that Prussia expressly undertook to pay certain war debts in its 1720 treaty with Sweden. [104]

154. It need hardly be pointed out that such solutions are generally based on considerations of political expediency. [105] Some writers, although their number is indeed small, base themselves on these somewhat rare precedents and on other considerations in recommending that the successor State should take over war debts. De Louter writes:

> There is no question but that Great Britain was ... duty bound, in 1901, to discharge the debts and other pecuniary obligations of the South African Republics it was conquering ... That is true of all debts, *regardless of the purpose for which they were incurred, including those resulting from efforts to defend the homeland and prevent it from being destroyed.* [106]

155. Pufendorf, on the other hand, took his stand on the acquired right of creditors to enforce respect for all debts, even odious ones, by the successor State. [107]

Feilchenfeld, for his part, states that:

> Most discussions, however, concern cases which are considerably weaker. They do not argue that a debt should not be maintained because the use of its proceeds had the incidental effect of injuring another State, as would be the case, for instance, if the use of the proceeds has the effect of diminishing the export of another country; nor that all debts should be exempt from maintenance which have been contracted with the purpose of using the proceeds in a way which is positively harmful to other countries. The customary arguments are essentially restricted to war debts, and even so frequently apply only to war debts contracted during a war which immediately precedes the annexation. Further, the customary argument is restricted to the fact that the exemption concerns debts which have been contracted in the last war fought against the annexing State. As has been shown in the historical parts,

[99] Treaty of Saint-Germain-en-Laye of 10 September 1919, art. 203 (*British and Foreign State Papers* (London, H.M. Stationery Office, 1922), vol. 112, pp. 405-407); Treaty of Trianon of 4 June 1920, art. 186 (*British and Foreign State Papers* (London, H.M. Stationery Office, 1923), vol. 113, pp. 556-558).

[100] Treaty of Neuilly of 27 November 1919, art. 141 (*British and Foreign State Papers* (London, H.M. Stationery Office, 1922), vol. 112, p. 821.

[101] Treaty of Peace with Italy, annex X (Economic and financial provisions relating to the Free Territory of Trieste), para. 5, and annex XIV (Economic and financial provisions relating to the ceded territories), para. 6 (United Nations, *Treaty Series*, vol. 49, pp. 210 and 226).

[102] Franco-Italian Conciliation Commission, decision No. 201 of 16 March 1956, concerning the interpretation and application to Ethiopian territory of the provisions of article 78, para. 7, of the Treaty of Peace: *Commission de conciliation franco-italienne, Recueil des décisions*, fifth fascicle, p. 296; and *Reports of International Arbitral Awards*, vol. XIII (United Nations publication, Sales No. 64.V.3), p. 639.

[103] Para. 149.

[104] See Feichenfeld, *op. cit.*, p. 75. The author also refers to the case of Greece in 1864 and to that of the unification of Italy (p. 269).

[105] The Special Rapporteur does not wish to imply that the opposite solution of rejecting war debts is not also based on political considerations. Law cannot be divorced from political realities. However, in the case of rejection, political considerations are more easily reconcilable with moral principles.

[106] J. de Louter, *Le droit international public positif* (Oxford, Publications of the Carnegie Endowment for International Peace, University Press, 1920), vol. I, p. 229 [French translation from Dutch; no English version was published].

[107] Referred to by Feilchenfeld, *op. cit.*, p. 32.

no specific custom has grown up which exempts war debts from maintenance in case of annexation or dismemberment. *

156. He goes on to say:

Apart from vague sentimental considerations, there is no serious ground why annexing States should not pay debts which are validly owed even if the proceeds have been used against their interests.

He supports this argument by stating, in particular:

If the feelings of the people of a State are not disturbed by the incorporation into its organization of men who have fought against it, and by the acquisition of assets which have been used for war purposes, there is no reason why they should be disturbed by the maintenance of war liabilities. [108]

He adds that it is not true that all creditors who lend money to a belligerent for purposes of war are gambling on the debtor's winning, and that they do not in fact expect to be paid in the event of defeat. In his view, war debts are not comparable to gambing debts. [109]

It should not be forgotten, however, that all these authors were writing at a time when war was not—or at least not completely—prohibited by contemporary international law.

2. Subjugation debts

157. Subjugation debts are debts contracted by a State with a view to attempting to repress an insurrectionary movement or war of liberation in a territory that it dominates or seeks to dominate, or to strengthen its economic colonization of that territory.

As Chicherin, People's Commissar for Foreign Affairs of Soviet Russia, stated on 28 October 1921, "no people is obliged to pay debts that are like the chains it has been forced to bear for centuries". [110] He was speaking in the specific context of the repudiation of "régime debts" following a succession of governments, namely, the substitution of the government of Soviet Russia for that of Tsarist Russia. The observation is far more pertinent, however, in the case of a people of one country held in subjugation by the government of another country.

158. In order to relieve the successor State of responsibility for these subjugation debts, theorists recall various similar historical precedents, in particular (*a*) the affair of the Cuban debts (1898); (*b*) the case of the debt for the installation of German settlers in Posen (1919); and (*c*) the problem of the Indonesian debt (1949).

(a) *Affair of the Cuban debts (1898)*

159. This affair, [111] which occurred immediately after the Spanish-American war that ended with the Treaty of Paris of 10 December 1898, originated with the United States, which was concerned to repudiate the debts contracted by Spain with a view to keeping Cuba under Spanish domination and opposing Cuba's war of liberation (insurrectionary movements of 1868 and 1895).

To set aside the "subjugation debts", the United States merely invoked the two principles which, singly or together, constitute the basis of many treaties both old and new, as well as of a large part of past and present theory on the freeing of the successor State from a public debt. To cite only one example out of a multitude, the Peace Treaty of Pressburg of 26 December 1805 between France and Austria [112] placed responsibility on the successor State for public debts that (*a*) had been "formally agreed to by the ceded States [provinces]" or (*b*) corresponded to "expenses for administering those States".

160. In the Cuban affair (1898), the United States put forward parallel arguments for rejecting Cuba's subjugation debts. First, it maintained that financial charges resulting from Spanish war loans had been imposed upon Cuba against its will and without its consent. It was true, of course, that the Spanish colony had not been consulted by the metropolitan country regarding those loans. The United States memorandum pointed out that the corresponding debts had been created by the Spanish Government for its own purposes, through its own agents, and that Cuba had had no part in their creation. [113] The United States also maintained that Spain had not contracted the loans in question for Cuba's benefit, and that indeed they had served *to finance operations that were manifestly contrary to the island's interests.* Cuba could not be held responsible for a debt contracted in order to maintain it as a Spanish dependency.

161. Spain, having undertaken a war of colonial reconquest in Santo Domingo, had in fact engaged in costly colonial expeditions that had considerably burdened the Cuban budget and debt between 1861 and 1880. This burden had been further increased when Spain started to repress the Cuban insurrectionary movements between 1868 and 1878. Thus Cuba's military expenditure under Spanish domination accounted for three quarters of its total expenditure in the financial year 1886/87. Loans contracted by Spain in 1890 were diverted in part from their original purpose and used directly to finance the repression of an insurrectionary movement in the island.

162. Spain countered all these United States arguments by contending that the major part of the loans had been contracted on behalf and for the benefit of Cuba and had, indeed, promoted the island's economic development. Moreover, at the Paris Peace Conference, Spain did not ask the United States to take over a loan of roughly two billion gold francs contracted after the start of the Cuban insurrection in February 1895. [114]

[108] Feilchenfeld, *op. cit.*, pp. 718-720.

[109] *Ibid.*, p. 721.

[110] *L'Europe nouvelle* (Paris, 5 November 1921), p. 1439.

[111] See Le Fur, *loc. cit.*, pp. 614-625; Feilchenfeld, *op. cit.*, pp. 337-342.

[112] Baron Descamps and L. Renault, *Recueil international des traités du XIX^e siècle* (Paris, Rousseau), vol. I (1801-1825), pp. 152 *et seq.*

[113] This view is opposed by C. Rousseau (*op. cit.*, p. 459), who uses the legalistic argument that, since the colony was represented in the Cortès, Cuba had consented to the loans in question, which had been approved by the Spanish parliament. The colonies had always had a factitious and derisory representation in the metropolitan assemblies and could express no consent. *It would in any case have been more than a little surprising for the Cubans to have validly agreed to a Spanish war effort directed against their own freedom.* Parliamentary representation was one of the fictions maintained by the system of colonial domination.

[114] See Le Fur, *loc. cit.*, p. 618 and foot-note; *Le Temps*, 23 October 1898.

163. The Treaty of Peace of 10 December 1898 [115] indirectly upheld the United States position of rejecting subjugation debts. Article I stated that "Spain relinquishes all claim of sovereignty over and title to Cuba", without specifying in favour of whom, thus enabling the United States to extend its "protectorate" to the island without taking responsibility for Spanish public debts in Cuba. Neither the United States nor Cuba assumed the subjugation debts, for which Spain took the responsibility.

164. Following that precedent, theorists drew a distinction between debts according to their purpose, ruling out the transfer of debts in connexion with subjugation and accepting the transferability only of those that had contributed to a territory's development. [116]

165. The solution was opposed by a few authors, including Frantz Despagnet, who wrote:

> Thus, it was said, Spain's debts stemmed from its expenditure on efforts to subdue the Cubans and the latter, once freed, did not have to suffer the result of liabilities contracted against them rather than for them. This attitude opens the way to all manner of disputes as to the utility of expenditure incurred by the dismembered country for the portion that is separated from it; it encourages the most arbitrary and most iniquitous solutions. It must be considered that, as long as they are united under a single authority, the various parts of a State form a cohesive whole and assume a collective and indivisible responsibility; once they are separated, this responsibility must be shared by them in equitable proportions. The fact that the expenditure was incurred by the State and that one or other of its provinces or colonies did not benefit from it is of little account, for the State incurred other expenses from which the province or colony in question did benefit, and the balance was thus restored. The solution should be the same, *even in the case of sums expended by the metropolitan country to combat a colony's revolt* *, as was argued in the case of Cuba. Spain, the legitimate sovereign of the island, was entitled to regard expenses incurred to maintain Cuba under its political protection and to enable Cuba to participate in Spain's political and economic life as useful for Cuba [*sic*]. [117]

The least that can be said is that this point of view is outmoded . . .

166. Turning to earlier instances of decolonization, [118] it will be seen that the new republics of Spanish America *spontaneously and unilaterally* assumed Spain's debts in return for "recognition, peace and friendship". However, like Cuba later, they appear to have refused to assume war debts. The Special Rapporteur has nevertheless found a case where one of the republics assumed debts of this kind. Under article 5 of the "treaty of recognition, peace and friendship" concluded between Spain and Bolivia in Madrid on 21 July 1947:

> The Republic of Bolivia ... has already spontaneously recognized, by Act of 11 November 1844, the debt contracted and charged to its Treasury on the direct orders of the Spanish Government or by order of the authorities established by it in the territory of Upper Peru, now the Republic of Bolivia; ... it undertakes ... to acknowledge as the consolidated debt of the Republic, to be treated as fully privileged, all debt-claims *of whatever kind* *, for *pensions, pay* *, supplies, advances, loans, *forced lending*, deposits, contracts and any other debt, whether *relating to the war* or antedating it, charged to its Treasury, provided that they are the result of direct orders of the Spanish Government or of its authorities in the provinces which today comprise the Republic of Bolivia ...". [119]

167. The Special Rapporteur will discuss later the special circumstances peculiar to this kind of decolonization. [120] The only conclusion that can be drawn is that reached in connexion with the Cuban affair of 1898: subjugation debts cannot be assumed by the successor State.

(b) *Case of the German debt relating to the Germanization of part of Poland (affair of the Posen settlers) [1919]*

168. Since Germany had contracted loans in order to establish its nationals as settlers on Polish territory, the Treaty of Versailles (28 June 1919) [121] absolved a restored Poland from having to assume the debt contracted by Germany for the economic subjugation of Poles by Germans. Article 255, paragraph 2, provided that:

> That portion of the debt which, in the opinion of the Reparations Commission, is attributable to the measures taken by the German and Prussian Governments for the German colonization of Poland, shall be excluded from the apportionment to be made under article 254.

The Allied Powers declared on 16 June 1919:

> It cannot be contemplated that Poland should bear either directly or indirectly the burden of a debt contracted to extend Prussian influence at the expense of Polish rights and traditions. [122]

(c) *Problem of the Indonesian debt (1949)*

169. At the Round Table Conference held in The Hague from 23 August to 2 November 1949, the problem of the Netherlands public debt arose and Indonesia declared readiness to assume certain debts prior to the Netherlands capitulation to the Japanese in Indonesia on 8 March (Java) and 7 April 1942 (Sumatra). Indonesia refused, however, to assume various debts subsequent to those dates, particularly those resulting from Netherlands military operations against the Indonesian national liberation movement. It was especially unwilling to assume debts for the financing of guerrilla operations between 21 July 1947 and 17 January 1948 and again between 20 December 1948 and 1 August 1949.

170. At the Round Table Conference, and under the agreements of 2 November 1949, the debts were apportioned so that 4.5 billion guilders would be payable by Indonesia and 2 billion guilders by the Netherlands.

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[115] See text in Le Fur, *loc. cit.*, pp. 598 *et seq.*

[116] C. L. von Var, "Die kubanische Staatsschuld", *Die Nation*, vol. XVI (Berlin, 22 April 1899), No. 30, p. 425. The author distinguishes between debts incurred for "Kulturobjekte" ("works of civilization", socio-economic development) and those incurred to deal with insurrections, maintaining that the latter should remain Spain's responsibility.

[117] F. Despagnet, *Cours de droit international public*, 3rd ed. (Paris, Larose and Tenin, 1905), p. 111.

[118] See paras. 281-294 below, especially paras. 291-294.

[119] *British and Foreign State Papers, 1868-1869* (London, Ridgway, 1874), vol. 59, p. 423.

[120] See paras. 291-294.

[121] For reference, see above, foot-note 95.

[122] "Reply of the Allied and Associated Powers", *British and Foreign State Papers* (London, H.M. Stationery Office, 1922), p. 290.

That arrangement reflected a desire for compromise involving, it seems, some departure from the principle of rejection of subjugation debts by the successor State, inasmuch as the political debt was not fully cancelled. However, as the agreements of 2 November 1949 were denounced by Indonesia in 1956, the Indonesian precedent does not conflict with previous practice. [123]

3. Draft article on odious debts

171. This review of State practice has amply demonstrated the reluctance of successor States to assume payment of "odious debts". Two problems arise in this connexion. The first concerns irregularity in State succession as such, and is thus antecedent to the question of succession to odious debts. The Special Rapporteur has already expressed his views on this point. [124] It should be understood that the contracting of odious debts does not preclude the occurrence of a perfectly regular State succession; it should not be concluded that, because a colonial Power has contracted debts with a view to suppressing a war of national liberation in a dependent territory, a State succession that leads to the creation of the newly independent State is irregular. All it means is that the new State will not assume the subjugation debts.

172. The second problem arises in connexion with a particular type of State succession, namely, the uniting of States. In contrast with what occurs in other types of succession, the successor State will probably assume all the debts, of whatever kind, of the States that unite. However, this characteristic, which would appear to be peculiar to the uniting of States, will be present only if the States that form a union retain no international personality, that is, if they form a unitary State. Where States that unite decide to establish their union on a federal basis, the odious debts contracted by one of them will probably remain its reponsibility, a fact that strengthens the argument that odious debts are rejected by the successor State. The Special Rapporteur therefore proposes that the exception, in the case of uniting of States, to the apparently general principle of rejection of odious debts by the successor State should be placed in square brackets.

173. The article might read:

Article D. Non-transferability of odious debts

[Except in the case of uniting of States,] odious debts contracted by the predecessor State are not transferable to the successor State.

C. Recapitulation of the text of the draft articles proposed in this chapter

Article C. Definition of odious debts

For the purposes of the present articles, "odious debts" means:

(*a*) all debts contracted by the predecessor State with a view to attaining objectives contrary to the major interests of the successor State or of the transferred territory;

(*b*) all debts contracted by the predecessor State with an aim and for a purpose not in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations.

Article D. Non-transferability of odious debts

[Except in the case of the uniting of States,] odious debts contracted by the predecessor State are not transferable to the successor State.

[123] The case of Algeria may also be mentioned. Algeria refused to assume the debts contracted by the predecessor State in connexion with the war of national liberation: debts contracted to finance French military operations in Algeria; recruitment of a force of *harkis* (Algerians who collaborated with the administering Power); compensation for the victims of "Algerian terrorism". See para. 334 below.

[124] See paras. 137-139 above.

Chapter IV

Succession to debts in cases of transfer of part of a territory

174. The Special Rapporteur will not dwell on the definition of the type of succession of States referred to by the expression "transfer of part of a territory". The definition is the same as that adopted, in respect of State property, by the Commission at its twenty-eighth session; it therefore relates to "a part of the territory of a State transferred by that State to another State". [125]

A. Categories of debts envisaged in cases of transfer of part of a territory

In this type of succession of States, four categories of debt may be identified.

1. General debt of the predecessor State

175. The first category is the *national public debt*, also called *general debt*, of the predecessor State, contracted for that State's general needs. It is a true "State debt" in the sense that the Special Rapporteur has assigned to that category in his classification of debts. The purpose of the present study is to determine whether or not the successor State assumes a part of this general debt proportionate to the size of the territory transferred to it. It must be borne in mind that there is "succession of States" in the strict sense when, as a result of a territorial change, certain international rights and duties of the predecessor State vis-à-vis third parties are transferred to the successor State solely by virtue of a rule of international law providing for such transfer, independently of any expression of wishes on the part of the precedessor or successor States.

The question here, therefore, is whether part of the general debt of the predecessor State passes to the successor State by virtue of a rule of international law. This general debt may or may not be secured by special resources or property belonging to the part of territory that is transferred.

[125] *Yearbook... 1976*, vol. II (Part Two), p. 127.

2. "Localized" State debts

176. Debts contracted by the government on behalf of the State as a whole but allocated to some specific need —construction of a port, a canal, a railway of local importance, and so on—fall into the second category, which the Special Rapporteur has termed a *localized State debt.* [126] This is of course a loan contracted by the State, but for the special needs of a specific territory. Sack calls debts of this type "special State debts". [127]

Debts of the predecessor State, where the contract expressly indicates that the debt was contracted for and on behalf of the transferred territory, should be treated in the same manner and included in this second category. These too are State debts "localized" in the ceded territory.

3. "Local" debts guaranteed by the State

177. The third category comprises debts contracted by the transferred territory by virtue of its financial autonomy, but guaranteed by the State to which the territory belonged. This category concerns not a State debt but a *State guarantee of a local debt proper to the transferred territory.* The subject-matter of State succession is not, even within the narrow confines of the present study, to determine merely what becomes of a debt of the predecessor State; it is also to determine what becomes of that State's obligation to back a debt of the territory it has transferred.

4. "Local" debts proper to the transferred territory

178. Finally, if a debt is contracted by the financially autonomous territory without any intervention or guarantee by the State, there is a fourth category, comprising "local" debts proper to the territory in question, that is, *debts contracted by local authorities for local needs.* These are debts of "administrative districts", as they are termed in some of the major peace treaties ending the First World War. [128] They are not State debts; accordingly, they do not concern the present study. It should, however, be pointed out that writers often wrongly refer to such purely local debts (which remain the responsibility of the transferred territory) as evidence that there is a principle of transferability of debts to the successor State in case of the transfer of a part of the territory of one State to another.

179. The Special Rapporteur will confine himself to considering State debts falling into the first two categories as well as State guarantees of local debts, since these entail an obligation of the predecessor State, and it is part of the subject matter of State succession to determine what ultimately becomes of such an obligation.

[126] See paras. 14-29 above.

[127] A. N. Sack, "La succession aux dettes publiques d'Etat", *loc. cit.*, p. 272; *Les effets des transformations des Etats...*, *op. cit.*, pp. 71-74, 76-78 and 192 and 193.

[128] See article 204 of the Treaty of Saint-Germain-en-Laye or article 187 of the Treaty of Trianon [for references to the text of these treaties, see foot-note 99 above].

B. Treatment of the general debt of the predecessor State in cases of transfer of part of a territory

180. The reference here is to the "national public debt", which is unquestionably a State debt. It is one that the predecessor State will have contracted for its *general needs* in respect of national defence, education, health, economic development or defence of the currency. The funds thus borrowed by the predecessor State will not have been allocated specifically for the *particular needs* of the territory subsequently transferred. They will have served the nation as such and will have been spent for the territory of the State as a whole before the latter's size was reduced. It is irrelevant, in this context, that the proceeds of the loan should have been allocated unequally among regions, in accordance with the needs of each region and of general State policy.

1. Uncertainties in the literature

181. The positions held on each category of debt have not been defined with the desired clarity and it is difficult to disentangle them. If, by good fortune, the effort is successful, it becomes apparent that opinions are very divided. In the case under consideration, relating to the general debt of the predecessor State a part of whose territory has been amputated and joined to another State, some writers have concluded that a proportion of the general debt may be transferred to the successor State, others that it may not, depending perhaps on whether or not they endorse the old theory of the patrimonial State, but more probably because of a degree of general confusion.

182. Since no solution is conclusive, it is not surprising that opinion should be divided. Fauchille sums up the situation very well as follows:

> ... What conclusion is to be drawn with regard to the general public debt of the dismembered State? Opinions on this differ widely. There are several schools of thought. According to the first, the cession by a State of a fraction of its territory should have no effect on its public debt; the debt remains wholly its responsibility, for the dismembered State continues to exist and retains its individuality; it must therefore continue to be held responsible vis-à-vis its creditors. Moreover, the annexing State, being only an assignee in its private capacity, should not be held responsible for personal obligations contracted by its principal. [Here Fauchille cites the proponents of this view.] The second holds that the public debt of the dismembered State must be divided between that State and the territory that is annexed; the annexing State should not bear any portion of it. [Fauchille cites a writer holding this view.] According to the third school of thought, the annexing State must take over part of the public debt of the dismembered State. There are two main grounds for this view, which is the most widely held. First, since the public debt was contracted in the interest of the entire territory of the State and the portion that is now detached benefited just as did the rest, it is only fair that it should continue to bear some of the burden. Secondly, since the annexing State receives the profits from the ceded part, it is only fair that it should bear its costs. The State, whose entire resources are assigned to payment of its debt, must be relieved of a corresponding portion of that debt when it loses a portion of its territory and thus a part of its resources [Fauchille cites those who support this theory, who seem to be in the majority]. [129]

[129] Fauchille, *op. cit.*, p. 351.

(a) *Theories favourable to the transfer of part of the general debt*

(i) *Theory of the patrimonial State and of the territory encumbered in its entirety with debts*

183. Alexandre N. Sack who, with E. H. Feilchenfeld, was undoubtedly the best authority on problems of succession to public debts during the period between the two world wars, was in favour of the transferability to the successor State of a part of the general debt of the predecessor State proportionate to the contributory capacity of the transferred territory. His reasons may be summarized as follows:

Whatever territorial changes a State may undergo, State debts continue to be guaranteed *by the entire public patrimony of the territory encumbered with the debt* *.[130] The legal basis for public credit lies precisely in the fact that public debts encumber the territory of the debtor State ...

...

From that standpoint, the principle of "indivisibility"[131] proclaimed in the French constitutions of the Great Revolution is very enlightening; it has also been proclaimed in a good number of other constitutions ...

...

... These government actions and their consequences, as well as other events, may adversely affect the debtor State's finances and its capacity to pay.

All these are risks that must be borne by creditors, who cannot and could not restrict ... the government's right freely to dispose of its property and of the State's finances ...

...

Nevertheless, creditors have a legal guarantee in that their claims encumber the territory of the debtor State.

...

The debt that encumbers the territory of a State is binding on any government, old or new, that has jurisdiction over that territory. In case of a territorial change in the State, *the debt is binding on all governments of all parts of that territory* * ...

The justification for such a principle is self-evident; when taking possession of assets, one cannot repudiate liabilities: *ubi emolumentum, ibi onus esse debet, res transit cum suo onere.*

Therefore, with regard to State debts, the *emolumentum* consists of the public patrimony within the limits of the encumbered territory.[132]

184. Here two arguments overlap. The principle of the first is debatable. According to this argument, since all parts of the territory of the State "guarantee", as it were, the debt that is contracted, the part that is detached will continue to do so even if it is placed under another sovereignty; hence the successor State is responsible for a corresponding part of the general debt of the predecessor State. Such an argument has as much validity as have the *theories of the patrimonial State* in general. The second argument casts an awkward shadow over the first by referring to the *benefit that the transferred territory may have derived from the loan*, or to the justification for taking over liabilities because of the acquisition of assets. This argument may fully apply in the case of "local" or "localized" debts, where the benefit derived from such debts by the transferred territory must be taken into account, or the assets compared with the liabilities. It has no relevance when, as in the case in point, the reference is to a general State debt contracted for a nation's general needs, which may be such that the said territory will not have benefited from it, or not as much as the other territories.

(ii) *Theory of the benefit derived from the loan by the transferred territory*

185. This theory of the benefit derived by the ceded territory is still further developed by other authors. There is a clear tendency to prefer the second theory to the first. For example, to quote Henry Bonfils: The State that profits from the annexation must be responsible for the contributory share of the annexed territory in the public debt of the ceding State. It is only fair that the cessionary State should share in the debts that *benefited the territory* * it is acquiring in various ways, directly or indirectly.[133] For Nicolas Politis: The State that contracts a debt, either through a loan or in any other way, does so for the general good of the nation; *all parts of the territory benefit from it*,[134] and he draws the same conclusion. Again, according to René Selosse: These debts were contracted in the general interest and were used to effect improvements from which *the annexed areas benefited in the past* and will perhaps benefit again in the future ... It is therefore fair ... that [the State] should be reimbursed for the part of the debt relating to the transferred province.[135,136]

186. In practice, this theory leads to an impasse; since the debt is a general debt of the State contracted for the general needs of the entire territory, with no precise prior assignment to or location in any particular territory, *the statement that such a loan benefited a particular transferred territory gives rise to vagueness and uncertainty*. It does not provide an automatic and reliable key to the assumption by the successor State of a fair and easily calculated share of the general debt of the predecessor State. In reality, this theory is an extension of the principle of succession to local debts and localized State debts, which will be considered below,[137] and which benefit only the transferred territory. Such an extension is questionable in the case of a general State debt. In addition, it may prove unfair in certain cases of territorial transfer, and this would destroy its own basis in equity and justice.

(iii) *Reference to the contributory strength of the transferred territory*

187. Other theories purport to explain *why* part of the general debt is transferable, but in fact they explain only

[130] It is clear from the context that the author is referring to the entirety of the territory of the predecessor State prior to its amputation.

[131] The author is referring here to the indivisibility of the Republic and of its territory.

[132] A. N. Sack, "La succession aux dettes publiques d'Etat", *loc. cit.*, pp. 274-277.

[133] H. Bonfils, *Manuel de droit international public (droit des gens)*, 5th ed. (Paris, Rousseau, 1908), p. 117.

[134] N. Politis, *op. cit.*, p. 111.

[135] R. Selosse, *Traité de l'annexion au territoire français et de son démembrement* (Paris, Larose, 1880), p. 168.

[136] For these and other authors, see details given by Sack in "La succession aux dettes publiques d'Etat", *loc. cit.*, pp. 295 *et seq.*

[137] See paras. 221 *et seq.* below.

how this operation should be effected. For example, certain theories make the successor State responsible for part of the general debt of the predecessor State by referring flatly to the "contributory capacity" of the transferred territory. Since such theories are diametrically opposed to the theory of benefit, the two positions cancel each other out.

188. The *contributory strength* of a transferred territory, calculated for example by reference to the fiscal resources and economic potential it previously provided for the predecessor State, is a criterion that is at variance with the theory of the benefit derived from the loan by the transferred territory. Thus a territory that is richly endowed by nature, and that has been attached to another State, may not have benefited much from the loan; on the other hand, it may have contributed greatly by its fiscal resources to the servicing of the general State debt by virtue of its membership of the former national community. Once the territory has been attached to another State, to request the successor State to assume a share of the predecessor State's national public debt, computed on the basis of the resources previously provided by the said territory, would not be justified by the theory of benefit. The criterion of the territory's financial capacity takes no account of the extent to which that territory may have benefited from the loan.

(iv) *Theory based on justice and equity*

189. However, this theory of the "contributory strength" of the territory leads to another theory, based on considerations of justice and equity towards the predecessor State and of security for creditors. It has been argued that the transfer of a territory, particularly of a rich territory, results in a loss of resources for the diminished State. Since the predecessor State—and indeed the creditors—relied on those resources, it is claimed that it is only fair and equitable that the successor State should have to assume part of the general debt of the predecessor State. The problem is how this share should be computed: some authors refer to "contributory capacity", which is logical given their premises (referring to the resources previously provided by the territory), while others consider the benefit the territory had derived from the loan. Thus the same overlapping considerations, always entangled and interlocked, are to be found in the works of the various authors.

190. It is particularly suprising to find the argument of justice and equity in the works of these authors of the nineteenth or early twentieth century, who were living at a time when provinces were annexed by conquest and by war. It is thus difficult to imagine how the annexing State, which did not shrink from the territorial amputation of its adversary or even the forced imposition on the adversary of reparations or a war tribute, could in any way be moved by considerations of justice and equity to assume part of the general debt of the State that it had geographically diminished. There is a certain lack of realism in this theoretical construction.

(v) *Inadequacy of these theories*

191. To sum up, it may be said that the ideas of "benefit derived from the loan by the ceded territory", of "justice and equity" towards the predecessor State and of "security" for creditors may undoubtedly play a role in the case of certain categories of debts or in certain types of State succession. However in cases of transfer of part of a territory, these ideas or theories remain generally insufficient to justify the transfer to the successor State of part of the general debt of the predecessor State. On the other hand, these theories—for example, the theory of the benefit derived from the loan by the ceded territory—may be quite appropriate for the categories of local or localized debts, both in this type of State succession and in others.

(b) *Theories opposed to a transfer of part of the general debt*

192. Other authors deny that there is any legal basis for the principle of transferability to the successor State of part of the national public debt of the predecessor State (still referring to the case of transfer of part of a territory). Some of them consider that, when succession to part of this State debt in fact occurs, it is for political or moral reasons rather than in compliance with a legal obligation. Two arguments are advanced in support of this theory.

(i) *Non-transferability based on State sovereignty*

193. The first argument is based on the sovereign nature of the State. The sovereignty exercised by the successor State over the detached territory is not a sovereignty transferred by the predecessor State: it is its own sovereignty. Where State succession occurs, there is no transfer of sovereignty but a *substitution* of one sovereignty for another. In other words, the successor State that is enlarged by a portion of territory exercises its own sovereign rights there and does not come into possession of those of the predecessor State; it therefore does not assume the obligations or part of the debts of the predecessor State.

(ii) *Non-transferability based on the nature of the debt*

194. The second argument derives from the nature of the State debt. The authors who deny that a portion of the national public debt (i.e. of a general State debt) is transferable to the successor State consider that this is a *personal* debt of the State that contracted it; hence, when a territorial change occurs, this personal debt remains the responsibility of the territorially diminished State, since that State retains its political personality despite the territorial loss suffered. For example, Professor Jèze writes:

> ... The dismembered or annexed State *personally* contracted the debt; (1) it solemnly undertook to service the debt, whatever happened. It is probable that it was counting on the tax revenue to be derived from the *whole* of the territory. In case of *partial* annexation, the dismemberment reduces the resources with which it expected to be able to pay its debt. *Legally*, however, the obligation of the debtor State cannot be affected by variations in the size of its resources.
>
> (1) The reference here is to *national*, not to *local* debts ...[138]

[138] Jèze, "L'emprunt dans les rapports internationaux ...", *loc. cit.*, p. 65. However, the author writes in the same article that:

(*Continued on next page.*)

He adds in a foot-note that:

in a case of partial annexation, most English and American authors regard this principle as absolute, to the point of declaring that the annexing State is not *legally* bound to assume *any* part of the debt of the dismembered State. [139]

according to W. E. Hall, for example:

... the general debt of a State is a personal obligation ... With rights which have been contracted by the old State as personal rights and obligations, the new State has nothing to do. The old State is not extinct. [140]

2. Aversion reflected in judicial precedents to transfer of part of the general debt

195. The most frequently cited precedent in this matter is the arbitral award made by Eugène Borel on 18 April 1925 in the *Ottoman public debt* case. Although this case involved a type of succession of States other than the transfer of part of the territory of one State to another —since it related to the apportionment of the Ottoman public debt among States and territories detached from the Ottoman Empire (separation of one or more parts of the territory of a State with or without the constitution of new States)—it is relevant here because of the general nature of the terms advisedly used by the arbitrator from Geneva. He took the view that there was no legal obligation for the transfer of part of the general debt of the predecessor State unless a treaty provision existed to that effect. In his ruling he said:

In the view of the arbitrator, despite the existing precedents, one cannot say that the Power to which a territory is ceded is automatically responsible for a corresponding part of the public debt of the State to which the territory formerly belonged. [141]

He went on to state even more clearly:

One cannot consider that the principle that a State acquiring part of the territory of another State must at the same time take responsibility for a corresponding portion of the latter's public debts as established in positive international law. Such an obligation can stem only from a treaty in which it is assumed by the State in question, and it exists only on the terms and to the extent stipulated therein. [142]

3. Variations in State practice

(a) *Assumption by the successor State of part of the national public debt of the predecessor State*

196. In this context, writers cite the case of Sardinia which, when Lombardy was annexed in 1859, is said to have taken over a large part of the *Austrian* debt. This is an erroneous reading of the Treaty of Zurich (10 November 1859), which imposed on Sardinia three fifths of the debt of *Lombardy*, not of *Austria*. The question of succession to the general debt of the predecessor State did not arise.

However, under article 1 of the Franco-Sardinian Convention of 23 August 1860, France, which had gained Nice and Savoy from the Kingdom of Sardinia, assumed responsibility for a small part of the Sardinian debt.

In 1866, Italy accepted a part of Pontifical debt proportionate to the population of the Papal States (Romagna, the Marches, Umbria and Benevento), which the Kingdom of Italy had annexed in 1860.

Greece, which had incorporated in its territory the former Ottoman territory of Thessalia, in 1881 accepted a part of the Ottoman public debt corresponding to the contributory capacity of the population of the annexed province (article 10 of the treaty of 24 May 1881).

197. The many territorial upheavals in Europe following the First World War raised the problem of succession of States to public debts on a large scale, and attempts to settle it were made in the treaties of Versailles, Saint-Germain-en-Laye and Trianon. In those treaties, writes Professor Rousseau,

political and economic considerations ... came into play. The Allied Powers, which had drafted the peace treaties virtually alone, had no intention of completely destroying the economic structure of the vanquished countries and reducing them to complete insolvency. That explains why the vanquished States were not left to shoulder their debts alone, for they would have been incapable of discharging them without the help of the successor States. But other factors were also taken into consideration, including the need to ensure preferential treatment for the Allied creditors and the difficulty of arranging regular debt servicing owing to the heavy burden of reparations.

...

Finally, it should be pointed out that the traditional differences in legal theory as to whether or not the transfer of public debts was obligatory caused a cleavage between the States concerned, entailing *radical opposition between the domestic judicial precedents of the dismembered States and those of the annexing States.* [143]

(*Foot-note 138 continued.*)

"The annexing State did not *personally* contract the debt of the annexed or dismembered State. It is logical and equitable that, as a result of the annexation, it should *at most* be obliged only *propter rem, because of the annexation* ... What exactly is involved in the obligation *propter rem*? It is the burden corresponding to the contributory strength of the inhabitants of the annexed territory." (*Ibid.*, p. 62.)

In this passage, then, Jèze favours a contribution by the successor State to the general debt of the predecessor State. But see also *ibid.*, p. 70:

"*Present* and *future* taxpayers in each portion of the territory of the dismembered State must continue to bear the total burden of the debt *regardless of the political events that occur*, even if the annexing State does not agree to assume part of the debt ... A change in the size of the territory cannot cause the disappearance of the legal obligation regularly contracted by the competent public authorities. The taxpayers of the dismembered State, despite the reduction in its territorial size and resources, remain bound by the original obligation."

Jèze must ultimately be classified among the authors who favour *conditional* transferability of part of the national public debt of the predecessor State, for he concludes with the following words:

"To sum up, *in principle*, (1) the annexing State must assume part of the debt of the annexed State; (2) this share must be calculated on the basis of the contributory strength of the annexed territory; (3) by way of exception, if it is demonstrated in a *certain and bona fide manner* that the annexed territory's resources for the present and for the near future are not sufficient to service the portion of the debt thus computed and chargeable to the annexing State, the latter may suspend or reduce the debt to the extent strictly necessary to obtain the desirable financial stability." (*Ibid.*, p. 72.)

[139] *Ibid.*, p. 65, foot-note 2.

[140] W. E. Hall, *A Treatise on International Law*, 7th ed. (Oxford, Clarendon, 1917), pp. 93 and 95, quoted by Sack, "La succession aux dettes publiques d'Etat", *loc. cit.*, p. 287.

[141] United Nations, *Reports of International Arbitral Awards* vol. I, p. 573.

[142] *Ibid.*, p. 571.

[143] C. Rousseau, *op. cit.*, p. 442.

198. A general principle of succession to German public debts was consequently affirmed in article 254 of the Treaty of Versailles (28 June 1919). According to this provision, the Powers to which German territory was ceded were to undertake to pay a portion—to be determined—of the debt of the German *Empire*, and of that of the German *State* to which the ceded territory belonged, as existing on 1 August 1914. [144]

199. However, article 255 of the Treaty provided a number of exceptions to this principle. For example, because Germany had refused, in consideration of the annexation of Alsace-Lorraine in 1871, to assume part of France's general public debt, the Allied Powers decided, at the request of France, to exempt France from any participation in the German public debt in consideration of the retrocession of Alsace-Lorraine.

200. Isaac Paenson cites a case of participation of the successor State in part of the general debt of its predecessor. It is a case, however, that is not consistent with contemporary international law, since the transfer of part of the territory was effected by force. The third Reich, in its agreement of 4 October 1941 with Czechoslovakia, assumed an obligation of 10 billion Czechoslovak korunas as a participation in that country's general debt (and also in the localized debt for the conquered *Länder* of Bohemia-Moravia and Silesia). Part of the 10 billion covered the consolidated internal debt of the State, the State's short-term debt, its floating debt and the debts of government funds such as the central social security fund, the electricity, water and pension funds, and so on (as well as all the debts of the former Czechoslovak armed forces, as at 15 March 1939, which were State debts and which the author incorrectly includes among the debts of the territories conquered by the Reich). [145]

201. The author also cites, in the context of the Second World War, Bulgaria's participation in the national debt of Romania as "one of the obligations, seemingly the most important, by virtue of which Bulgaria was to pay Romania 1 billion lei" [146] under the Craiova agreement (7 September 1940), whereby Romania ceded to Bulgaria southern Dobruja, whose Bulgarian population outnumbered its Romanian population.

[144] War debts were thus excluded; see chap. III above. Article 254 of the Treaty of Versailles [for reference, see above, foot-note 95] read as follows:

"The Powers to which German territory is ceded shall, subject to the qualifications made in Article 255, undertake to pay:

(1) A portion of the debt of the German Empire as it stood on August 1, 1914 ...

(2) A portion of the debt as it stood on August 1, 1914, of the German State to which the ceded territory belonged ..."

[145] I. Paenson, *Les conséquences financières de la succession des Etats* (Paris, Domat-Montchrestien, 1954), pp. 112 and 113.

The author refers to an irregular annexation and, moreover, considers the Czechoslovak case as falling within the category of "cession of part of a territory"; in fact, the case was more complex, involving disintegration of the State not only through the joining of territories to Hungary and to the Reich, but also through the creation of States: the so-called "Protectorate of Bohemia-Moravia" and Slovakia.

[146] *Ibid.*, pp. 115 and 116 and *passim*, particularly p. 102.

(b) *Exoneration of the successor State from any portion of the national public debt of the predecessor State*

202. Article 3 of the "Peace preliminaries between Austria and Prussia on the one hand and Denmark on the other hand, signed at Vienna on 1 May 1864, provided that:

Debts contracted specifically on behalf [either] of the Kingdom of Denmark [or of one of the Duchies of Schleswig, Holstein and Lauenburg] shall remain the responsibility of each of those countries. [147]

203. At a time when annexation by conquest was the general practice, Russia rejected any succession to part of the Turkish public debt for territories it had conquered from the Ottoman Empire. Its plenipotentiaries drew a distinction between transfer of part of a territory by agreement, donation or exchange (which could perhaps give rise to the assumption of part of the general debt, and territorial transfer effected by conquest (as was acceptable at the time), which in no way created any right to relief from the debt burden of the predecessor State. Thus, at the meeting of the Congress of Berlin of 10 July 1878, the Turkish plenipotentiary, Karatheodori Pasha, proposed the following resolution: "Russia shall assume the part of the Ottoman public debt pertaining to the territories annexed to Russian territory in Asia." According to the record of the meeting:

Count Shuvalov replied that he believed he was justified in considering it generally recognized that, whereas debts in respect of territories that were derached by agreement, donation or exchange would be apportioned, that was not so in the case of conquest. Russia was the victor in Europe and in Asia. It did not have to pay anything for the territories and could in no way be held jointly responsible for the Turkish debt. Prince Gorchakov categorically rejected Karatheodori Pasha's request and could not conceal his astonishment at it.

The President said that, in view of the opposition of the Russian plenipotentiaries, he could see no possibility of acceding to the Ottoman proposal. [148]

204. Some writers have cited the annexation of part of the territory of Mexico by the United States as an example of participation in the general debts of the predecessor State. Le Fur writes:

The United States ... recognized this principle at various times, upon the admission to the Union of the various states that compose it; it did so relatively recently, at the time of the annexation of Texas. It was on the occasion of that annexation that President Tyler, in 1844, in a message to Congress, said that the United States could not honourably take over the land without taking over responsibility for the payment in full of all the debts with which it was encumbered. [149]

There seems to be some confusion in the author's mind. The Union in fact assumed the debts of the various states composing it, but that was a case of a uniting of states or federation. The incorporation of Texas was a very different case, since it genuinely involved the transfer of part of the territory of one State to another.

[147] G. F. de Martens, ed., *Nouveau Recueil général de traités* (Göttingen, Dieterich, 1869), vol. XVII, pp. 470 *et seq.*

[148] Protocol No. 17 of the Congress of Berlin for the Settlement of Affairs of the East, in *British and Foreign State Papers* (London, Ridgway, 1855), vol. LXIX, p. 1055 [text of protocol cited in French]. This was exactly the policy followed by the other European Powers in cases of conquest.

[149] Le Fur, *loc. cit.*, p. 622.

In that case, the reality seems to the Special Rapporteur to have been somewhat different, in view of the solutions adopted. Article XII, paragraph 1, of the Treaty concluded in Guadalupe Hidalgo on 2 February 1848 between the United States and Mexico [150] provided:

> In consideration of the extension acquired by the boundaries of the United States, as defined in the Vth article of the present Treaty, the Government of the United States engages to pay to that of the Mexican Republic the sum of 15 million dollars.

It is thus clear that the sum paid by the United States was entirely unconnected with any participation by the latter in a portion of Mexico's national public debt; according to the treaty, the justification for the payment was the expansion of the territorial boundaries of the United States at the expense of Mexico.

It is true that the treaty included two other articles, XIII and XIV, [151] on which Le Fur based his conclusion that the United States had assumed part of Mexico's national public debt. In the opinion of the Special Rapporteur, however, this was not the case.

205. Article VI of the Treaty of Peace concluded at Vienna on 3 October 1866, whereby Austria ceded the region of Lombardy-Venezia to Italy, provided:

> The Italian Government will assume: 1. the portion of the debt of the Lombardo Veneto fund that devolved upon Austria by virtue of the convention concluded in Milan in 1860 in execution of the Treaty of Zurich; 2. the debts added to the Lombardo Veneto fund since 4 June 1859; 3. a sum of 35 million florins, in Austrian currency, for the portion of the loan of 1854 allotted to Venezia, and for the cost of the non-transferable war matériel. [152]

It may be seen that in this case a treaty placed responsibility for certain State debts previously assumed by the Austrian Government and relating to the transferred territory of Lombardy-Venezia, together with other debts, upon the successor State, Italy.

206. The Treaty of Frankfurt (10 May 1871) between France and Prussia, whereby Alsace-Lorraine passed to Germany, was deliberately silent on the assumption by the successor State of part of the French general debt. Prince von Bismarck, who in addition had imposed on France after its defeat at Sedan the payment of war indemnities amounting to 5 billion francs, had categorically refused to assume a share of the national public debt of France proportionate to the size of the territories detached from France. [153] As has been seen, [154] the cession of Alsace-Lorraine to Germany in 1871, free and clear of any contributory share in France's public debt, had a mirror effect in the subsequent retrocession to France of the same provinces, also free and clear of all public debts, under articles 55 and 255 of the Treaty of Versailles.

207. When Chile, under the Treaty of Ancón (20 October 1883), annexed the province of Tarapacá from Peru, it refused to assume responsibility for any part whatever of Peru's national public debt. However, after disputes had arisen between the two countries concerning the implementation of the Treaty, another treaty was signed by them at Lima on 3 June 1929 confirming Chile's exemption from any part of Peru's general debt. [155]

In 1905, no part of Russia's public debt was transferred to Japan with the southern part of the island of Sakhalin.

208. Following the Second World War, the trend of State practice broke with the solutions adopted at the end of the First World War. Unlike the treaties of 1919, those concluded after 1945 generally excluded the successor States from any responsibility for a portion of the national public debt of the predecessor State. Thus the Treaty of Peace with Italy (10 February 1947) ruled out any succession to the debts of the predecessor State, for instance in the case of Trieste, [156] except in respect of holders of bonds for those debts issued in the ceded territory. Similarly, the cession to France of Tenda and Briga, which were formerly Italian, entailed no participation by France in Italy's national public debt. [157] In these circumstances, it was no longer a question of the general debt of the predecessor State, but rather of the special State debt earmarked for the ceded territory. The Special Rapporteur will devote a few paragraphs to this question later. [158]

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[150] See *British and Foreign State Papers* (London, Harrison, 1862), p. 567.

[151] The two articles read as follows:

Article XIII: The United States engage, moreover, to assume and pay to the claimants all the amounts now due them, and those hereafter to become due, by reason of the claims already liquidated and decided against the Mexican Republic, under the Conventions between the two Republics, severally concluded on the eleventh day of April eighteen hundred and thirty-nine, and on the thirtieth day of January eighteen hundred and forty-three: so that the Mexican Republic shall be absolutely exempt for the future, from all expense whatever on account of the said claims.

Article XIV: The United States do furthermore discharge the Mexican Republic from all claims of citizens of the United States, not heretofore decided against the Mexican Government, which may have arisen previously to the date of the signature of this Treaty: which discharge shall be final and perpetual, whether the said claims be rejected or be allowed by the Board of Commissioners provided for in the following Article, and whatever shall be the total amount of those allowed.

[152] See G. F. de Martens, ed., *op. cit.* (1873), vol. XVIII, p. 406.

[153] The fact that Prince von Bismarck affected to reduce the cost of war indemnities by first fixing them at 6 billion could be misleading; however, it did not imply an assumption of part of the general debt of France. This apparent concession by Prince von Bismarck was later used by d'Arnim at the Brussels Conferences, on 26 April 1871, as a pretext for ruling out any participation by Germany in France's general public debt.

[154] See para. 199 above.

[155] However, deposits of guano situated in the province transferred to Chile had apparently served to guarantee Peru's public debt to foreign States such as France, Italy, the United Kingdom or the United States. Claims having been lodged against the successor State for continuance of the security and assumption of part of the general debt of Peru secured by that resource of the transferred territory, a Franco-Chilean arbitral tribunal found that the creditor States had acquired no guarantee, security or mortgage, since their rights resulted from *private* contracts concluded between Peru and certain nationals of those creditor States (arbitral award of Rapperschwyl of 5 July 1901). See Feilchenfeld, *op. cit.*, pp. 321-329, and D. L. O'Connell, *The Law of State Succession* (Cambridge, University Press, 1956), pp. 167-170. In any event, the Treaty of Lima referred to above confirmed the exoneration of Chile as the successor State.

[156] For reference, see foot-note 101 above.

[157] However, France assumed the State debt that had been incurred prior to entry into the war for non-military purposes and that had been used for the benefit of Tenda and Briga on public works or civil administrative services (see para. 234 below).

[158] See paras. 221-238 below.

4. General conclusions

(a) *Non-existence of a general rule concerning transfer of part of the debt*

209. Refusal of the successor State to assume part of the general debt of the predecessor State seems to prevail in writings on the subject and in judicial and State practice. Political considerations or considerations of expediency have admittedly played some part in such refusals, but their influence appears to have been even greater in cases where the successor State ultimately assumed a portion of the general debt of the predecessor State, as occurred in the peace treaties ending the First World War. In any event, it must also be recognized that the bulk of the multitude of treaty precedents available consist of treaties terminating a state of war; and there is a strong presumption that that is not a context in which States express their free consent, or are inclined to yield to the demands of justice, of equity or even of law, if it exists.

210. In any case, the refusal of the successor State to assume part of the national public debt of the predecessor State appears to have logic on its side, as Cavaré remarks, although he agrees that is is "hard . . . for the ceding State, which is deprived of part of its property without being relieved of its debt, whereas the cessionary State is enriched or enlarged without a corresponding increase in its debt burden".[159] It would be vain, however, to try to find an incontestable rule of international law to prevent such a situation. There remains, perhaps, equity, which resolves the problem but creates others.

(b) *Problems resulting from the demands of equity*

211. In the absence of a rule of international law, and assuming the desirability, for reasons of equity, morality and justice, that the successor State should have to bear part of the general debt of the predecessor State, how can its contribution be determined? If war debts, naturally, are excluded (and it would be unseemly, if not odious, to oblige the successor State to assume these, especially if it had suffered from the war), it is hard to see by what criterion of " purpose " one loan rather than another could be assigned to the successor State, since by definition it is a question of the *general* debt of the State.

212. Writings on the subject and State practice have at one time or another used criteria for apportionment based on the total population of the transferred territory, on the size of that territory or on the share of taxes paid by that territory. The Special Rapporteur has observed a more marked preference for the third formula, which appears less arbitrary because there is a necessary correlation between the national public debt and the taxes borne by the inhabitants. Taxes constitute, in a sense, the "guarantee" of the general debt of the State. As Jèze writes, loans are only "advances on revenue from taxes to be paid by future generations".[160]

213. It might therefore be possible to determine the portion of the general debt to be assigned to the successor State on the basis of the *fiscal criterion*, that is, of the proportion of taxes borne by the transferred territory. This criterion may be further refined by referring rather to the *contributory capacity* of the transferred territory, of which the tax base is only one aspect. This formula would link the economic potential of the transferred territory to its fiscal status, all in relation to the productive and contributory capacity of the entire territory of the predecessor State.

(c) *Proposals of the Special Rapporteur*

214. (A) At the end of this review of the treatment of the general debt of the predecessor State in the case of transfer of part of its territory, the Special Rapporteur is left with a sense of frustration. Since no solution is obviously conclusive, he is strongly inclined, in all honesty, to propose two different texts to the Commission, each providing for one of the two conceivable but contrary solutions. He leaves the final choice to the superior knowledge and wisdom of the Commission.

The two articles, which contradict each other, might be worded as follows:

Article Y. Exoneration of the successor State from any participation in the general debt of the predecessor State

When part of the territory of a State is transferred by that State to another State, the successor State shall assume no part of the general debt of the predecessor State unless otherwise stipulated by treaty.[161]

Article Z. Contribution of the successor State to part of the general debt of the predecessor State

When part of the territory of a State is transferred by that State to another State, the contribution of the successor State to the general debt of the predecessor State shall be settled by treaty.

In the absence of a treaty, the successor State shall assume a part of the general debt of the predecessor State proportionate to the contributory capacity of the transferred territory.

215. These two articles would be preceded by an article X defining a *general State debt*. Article X would later be included with other defining articles to form a chapter on "use of terms". For the time being, it might be worded as follows:

Article X. Definition of general State debt

For the purposes of the present articles, general State debt means a State debt contracted by a central State body to meet the general needs of the State.

216. (B) The Special Rapporteur has on several occasions shown the importance of political considerations in the solution of these problems. Such considerations constitute a factor of uncertainty. Yet another factor, inherent in the very nature of this particular type of State succession, should also be mentioned at this point. The difficulty in a case of transfer of part of a territory is that the transfer may involve either a very small area or a very large one. This type of succession, then, may affect minor boundary adjustments as well as very large territories and vast provinces. It is this fact—the vastness of the territorial change that has occurred or, conversely, the insignificance of the piece of territory involved—that gives the specific case of transfer of part of a territory from one State to another its duality or "ambivalence",

[159] L. Cavaré, *op. cit.*, p. 380.

[160] Jèze, "L'emprunt dans les rapports internationaux ...", *loc. cit.*, p. 70.

[161] The following might be added: **or unless all or part of that general debt is covered by guarantees, securities and mortgages situated in the transferred territory.**

and thus makes it so difficult. It should be added, however, that the size of a territory often bears no relation to its wealth, so that a few square kilometres transferred by a State may represent a severe economic and financial loss to it by reason of the surface and underground resources, population density and other advantages of the area concerned.

217. If, then, the losses sustained by the predecessor State prove to be minimal or relatively insignificant, not so much because of the size of the transferred territory as because of its limited contributory capacity, a rule of the kind contained in article Y will meet the requirements of both logic and simplicity. In the contrary case the provisions of article Z would better meet the desire for justice and equity. That, however, has been the issue throughout diplomatic history in every case where this solution has been adopted. In pointing this out, the Special Rapporteur wishes to emphasize that at no time, whether in the past or in the present, has the existence of a rule of international law regarding succession to a portion of the general debt of the predecessor State been demonstrated.

218. Can a bridge be established between article Y, which is better suited in the case of an economically insignificant territorial transfer, and article Z, which is in greater conformity with the requirements of a more significant territorial acquisition? The common denominator, which would make it possible to combine articles Y and Z, would be the extent of the transferred territory's "contributory capacity" or, more precisely, by correlation, the part of the burden of the general debt of the predecessor State previously borne by that territory. According to whether that part was minimal or very large, the solution should be based on article Y or on article Z.

219. (C) A partial synthesis of articles Y and Z could then be attempted, as follows:

Article YZ. Conditions for contribution of the successor State to a portion of the general debt of the predecessor State

When part of the territory of a State is transferred by that State to another State, the contribution of the successor State to the general debt of the predecessor State shall be settled by treaty.

In the absence of a treaty, the successor State shall be obligated for a part of the general debt of the predecessor State only if the contributory capacity of the transferred territory was of significant importance to the predecessor State.

In that case, the part of the general debt of the predecessor State to be borne by the successor State shall be determined on the basis of the previous contribution of the transferred territory to the financial resources of the predecessor State.

220. However, to evaluate the practicality of article YZ, an important point must be kept in mind. Although it is probably just and equitable not to wish to deprive the predecessor State of an important contribution on which it depended as long as it held sovereignty over the part of territory that it has had to transfer, it is no less just and equitable to remember that the transferred territory must also retain its contributory capacity for the benefit of the State in which it is now incorporated, by virtue of a new national solidarity.

C. Special State debts of benefit only to the ceded territory (localized State debts)

1. The literature

221. It should be recalled that the debts referred to in this section are State debts contracted by the central government on behalf of the entire State, but intended especially to meet specific needs, so that the proceeds of the loan may have been used for a project *in the transferred territory*: digging a canal, constructing a railway, building a port, establishing a body that is national in character (e.g., a research institute), and so on. These are national debts, the State being the debtor. Appleton designates and defines them as follows: "What is meant by *debts relating to the ceded province* * is not provincial debts, but debts that the State itself contracted for the exclusive benefit of the province". [162]

222. Identifying such debts may prove difficult in practice. Sack writes:

> ... it is not always possible to establish precisely (a) the intended purpose of each particular loan at the time it is concluded; (b) how it is actually used; (c) the place to which the related expenditure should be attributed ...; (d) whether a particular expenditure in fact benefited the territory in question. [163]

223. The most commonly—and perhaps most lightly—accepted theory is that a special State debt of benefit only to the ceded territory should be attributed to the transferred territory, for whose benefit it was contracted. It would then pass, it is said, with the transferred territory, "by virtue of a kind of right of continuance (droit de suite)". [164] However, a sufficiently clear distinction is not drawn between State debts contracted for the particular benefit of a portion of territory and local debts proper, which are not contracted by the State. Moreover, the assertion that the debts follow the territory by virtue of a kind of right of continuance, and that they remain the responsibility of the transferred territory, implies that that territory was responsible for them *before* its transfer, which is not true of localized State debts, these being normally chargeable to the State's central budget. Finally, there is too much incorrect terminology and imprecision as regards what becomes of a *special* State debt, a problem that is in fact less difficult to resolve than that of the future of a *general* State debt.

224. Writers on the subject appear generally to agree that the successor State should assume special debts of the predecessor State, as particularized and identified by some project carried out in the transferred territory. The debt will, of course, be attributable to the successor State and not to the transferred territory, which had never assumed it directly under the former legal order and to which there is no reason to attribute it under the new legal order. Moreover, it may be argued that, if the transferred territory was previously responsible for the debt, it could not be regarded with certainty as a

[162] H. Appleton, *Des effets des annexions de territoires sur les dettes de l'Etat démembré ou annexé et sur celles des provinces, départements etc., annexés* (Paris, Larose, 1895), p. 156.

[163] Sack, "La succession aux dettes publiques d'Etat", *loc. cit.*, p. 292.

[164] An expression used by Despagnet, *op. cit.*, p. 109.

State debt especially contracted by the central government for the benefit or the needs of the territory concerned, but rather as a local debt contracted and assumed by the territorial district itself. That is a completely different case.

2. State practice

225. State practice shows that the attribution of State debts to the successor State has in fact nearly always been accepted.

(a) *Assumption by the successor State of special State debts contracted exclusively in the interests of the transferred territory (or secured on the resources of that territory)*

226. In 1735, Emperor Charles VI borrowed 1 million crowns from London financiers and merchants, securing the loan on the revenue of the Duchy of Silesia. Upon his death in 1740, Frederick II of Prussia obtained the Duchy from Maria Theresa under the treaties of Breslau and Berlin. Under the latter treaty, signed on 28 July 1742, Frederick II undertook to assume the sovereign debt (or State debt, as it would now be called) with which the province was encumbered as a result of the security arrangement.

227. Two articles of the Treaty of Peace between the Emperor of Austria and France, signed at Campo Formio on 17 October 1797, presumably settled the question of the State debts contracted in the interests of the Belgian provinces or secured on them at the time Austria ceded those territories to France:

Article IV. All debts that were secured, prior to the war, on the territory of the countries specified in the preceding articles and that were contracted in accordance with the customary formalities shall be assumed by the French Republic.

Article X. Debts secured on the territory of countries ceded, acquired or exchanged under this Treaty shall pass to the parties into whose possession the said countries come. [165]

228. These two articles, like similar articles in other treaties, referred without further specification to "debts secured on the territory" of a province. This security arrangement may have been made either by the central authority in respect of State debts or by the provincial authority in respect of local debts. The context, however, suggests that the the reference was in fact to State debts, since the debts were challenged for the very reason that the provinces in question had not consented to them. France refused on that ground to assume the so-called "Austro-Belgian" State debt dating from the period of Austrian rule. [166]

229. As a result, France, Germany and Austria included in the Treaty of Lunéville of 9 February 1801 an article VIII reading as follows:

As in articles IV and X of the Treaty of Campo Formio, it is agreed that, in all countries ceded, acquired or exchanged under this Treaty, those into whose possession they come shall assume any debts secured on the territory of the said countries; in view, however, of the difficiulties which have arisen in this connexion with regard to the interpretation of the said articles of the Treaty of Campo Formio, it is expressly agreed that the French Republic shall assume only debts resulting from loans formally authorized by the States of the ceded countries or from expenditure undertaken for the actual administration of the said countries. [167]

[The term "States" refers here not to State entities but to provincial bodies.]

230. Under the Treaty of Peace between France and Prussia signed at Tilsit on 9 July 1807, the successor State was made liable for debts contracted by the former sovereign for or in the ceded territories. Article 24 reads as follows:

Such undertakings, debts and obligations of whatsoever nature as His Majesty the King of Prussia may have entered into or contracted ... *as owner* * of countries, territories, domains, property and revenue ceded or renounced by His Majesty under this Treaty shall be assumed by the new owners ...". [168]

Article 9 of the Treaty of 26 December 1805 between Austria and France provided that His Majesty the Emperor of Germany and Austria "shall remain free of any obligation in relation to *any debts whatsoever which the House of Austria has contracted by reason of possession,* * and has secured on the territory, of the countries renounced by it under this Treaty". [169]

Similarly, article 8 of the Treaty of 11 November 1807 between France and Holland provided that "such undertakings, debts and obligations of whatsoever nature as His Majesty the King of Holland may have entered into or contracted as owner of the ceded cities and territories shall be assumed by France . . .". [170] Article 14 of the Treaty of 28 April 1811 between Westphalia and Prussia is identical with the article just cited. [171]

231. Article VIII of the Treaty of Lunéville of 9 February 1801 served as a model for article V of the Treaty of Paris between France and Württemberg of 20 May 1802, which stated:

Article VIII of the Treaty of Lunéville concerning debts secured on the territory of the countries on the left bank of the Rhine shall serve as a basis and rule in respect of the debts with which the possessions and countries included in the cession under article II of the present Treaty are encumbered. [172]

The Treaty of 14 November 1802 between the Batavian Republic and Prussia contains a similarly worded

[165] A. J. H. de Clercq, *Recueil des traités de la France* (Paris, Durand, 1880), vol. I (1713-1802), pp. 336 and 337; G. F. de Martens, ed., *Recueil des principaux traités* (Göttingen, Dieterich, 1829), vol. VI, pp. 422 and 423.

[166] Cf. A. N. Sack, "La succession aux dettes publiques d'Etat", *loc. cit.*, pp. 268 and 269.

[167] De Clercq, *op. cit.*, vol. I (1713-1802), pp. 426 and 427; de Martens, ed., *op. cit* (1831), vol. VII, p. 299; Baron Descamps and L. Renault, *Recueil international des traités du XIX^e siècle* (Paris, Rousseau), vol. I (1801-1825), p. 3.

[168] De Clercq, *op. cit.*, vol. II (1803-1815), p. 221; de Martens, ed., *op cit.* (1835), vol. VIII, p. 666; Descamps and Renault, *op. cit.*, p. 184.

[169] De Clercq, *op. cit.*, vol. II (1803-1815), pp. 147 and 148; de Martens, ed., *op. cit.*, vol. VIII, p. 391; Descamps and Renault, *op. cit.*, p. 153.

[170] De Clercq, *op. cit.*, vol. II (1803-1815), p. 241; de Martens, ed., *op. cit.*, vol. VIII, p. 720.

[171] De Martens, ed., *Nouveau Recueil de traités* (Göttingen, Dieterich, 1817), vol. I, p. 367.

[172] De Clercq, *op. cit.*, vol. I (1713-1802), p. 582; de Martens, ed., *Recueil des principaux traités* (Göttingen, Dieterich, 1831), vol. VII, p. 430.

article IV.[173] Again, article XI of the Treaty of 22 September 1815 between the King of Prussia and the Grand Duke of Saxe-Weimar-Eisenach provided that "His Royal Highness shall assume [any debts] ... especially secured on the ceded districts".[174]

232. Article IV of the Treaty of 4 June 1815 between Denmark and Prussia provided as follows:

H.M. the King of Denmark undertakes to assume the obligations which H.M. the King of Prussia has contracted in respect of the Duchy of Lauenburg under articles 4, 5 and 9 of the Treaty of 29 May 1815 between Prussia and His Britannic Majesty, King of Hanover. ...[175]

The Franco-Austrian agreement of 20 November 1815, whose 26 articles dealt exclusively with debt questions, required the successor State to assume debts which "formed part of the French public debt" (State debts), but "originated as debts specially secured on countries which have ceased to belong to France or were contracted for purposes of the internal administration of the said countries" (article VI).[176]

233. Although it entailed an irregular and forced annexation of territory, mention may be made of the assumption by the Third Reich, under an agreement of 4 October 1941, of debts contracted by Czechoslovakia for the purchase of private railways in the *Länder* seized from it by the Reich.[177] Debts of this kind seem to be governmental in origin and local in purpose.

234. After the Second World War, France, which had regained Tenda and Briga from Italy, agreed to assume part of the Italian debt only under the following four conditions: (*a*) that the debt was attributable to public works or civilian administrative services in the transferred territories; (*b*) that the debt had been contracted before Italy's entry into the war and had not been intended for military purposes; (*c*) that the transferred territories had benefited from the debt; (*d*) that the creditors resided in the transferred territories.

235. Succession to special State debts that were used to meet the needs of a particular territory is more likely if the debts in question are backed by special security arrangements. The predecessor State may have secured its special debt on tax revenue derived from the territory that it is losing or on property situated in the territory in question, such as forests, mines or railways. In both cases, succession to such debts is usually accepted.

Only in rare cases is a special State debt that was used to meet the particular needs of a transferred territory regarded as non-transferable.

(b) *Refusal of the successor State to assume special State debts contracted for the particular needs of the transferred territory (or secured on the resources of that territory)*

236. Although article 254 of the Treaty of Versailles laid down the general principle of succession to the public debts of the predecessor State, article 255 of the Treaty provided for a number of exceptions to that principle.[178] Thus, in the case of all ceded territories other than Alsace-Lorraine, the portion of the debt of the German Empire or the German States that represented expenditure by them upon property and possessions belonging to them and situated in the ceded territories was not assumed by the successor States. Political considerations played a role in this instance.

3. Proposals of the Special Rapporteur

237. The problem of succession to special State debts is relatively easier to deal with than that of succession to general State debts, for there appears to exist a rule of international law requiring the successor State to assume a special debt contracted by the predecessor State to meet the particular needs of the transferred territory. This rule may be stated very simply, but first it is necessary to define what is meant by a "special State debt". This definition will be given subsequently, together with others, in a chapter on use of terms.

238. At this stage, the following wording may be presented:

Article A. Definition of a special State debt (or localized State debt)

For the purposes of the present articles, special State debt (or localized State debt) means a State debt contracted by a central State organ to meet the special needs of a particular territory.

Article B. Assumption of special State debts by the successor State

When part of the territory of a State is transferred by one State to another State, the successor State shall, unless otherwise agreed, assume the special debts of the predecessor State relating to the transferred territory.

D. Local public debts guaranteed by the predecessor State

239. The problem referred to here should not concern this study, since it involves a local public debt, that is, a debt contracted by a local authority of an administrative district to meet purely local needs. It is not a State debt, but a local public debt proper to the transferred territory. Before the State succession, however, the State may have agreed to guarantee this purely local debt. It is the treatment of this *State guarantee*, backing a debt that is not itself a State debt, that should be dealt with in the present study. This guarantee provided by the

[173] De Martens, ed., *op. cit.*, vol. VII, pp. 427 and 428.

[174] De Martens, ed., *Nouveau Recueil de traités* (Göttingen, Dieterich, 1831), vol. III, p. 330; Descamps and Renault, *op. cit.*, p. 513.

[175] De Martens, ed., *op. cit.* (1887), vol. II, p. 350; Descamps and Renault, *op. cit.*, p. 426.

[176] De Martens, ed., *op. cit.*, vol. II, p. 723; Descamps and Renault, *op. cit.*, p. 531. See also article 5 of the Treaty of 14 October 1809 between France and Austria concerning debts secured on the territories (Upper Austria, Carniola, Carinthia, Istria) ceded to France by Austria (de Clercq, *op. cit.*, vol. II, p. 295; de Martens, ed., *op. cit.*, vol. I, p. 213); article VII of the Treaty of 3 June 1814 between Austria and Bavaria (de Martens, ed., *op. cit.*, vol. II, p. 21); article IX of the Treaty of 18 May 1815 between Prussia and Saxony (de Clercq, *op. cit.*, vol. II, pp. 520 and 521; de Martens, ed., *op. cit.*, vol. II, pp. 277 and 278); article XIX of the Treaty of Cession of 16 March 1816 under which the Kingdom of Sardinia ceded to Switzerland various territories in Savoy that were incorporated in the Canton of Geneva (de Martens, ed., *op. cit.*, vol. IV (1880), p. 223; Descamps and Renault, *op. cit.*, p. 555).

[177] Paenson, *op. cit.*, p. 113.

[178] See paras. 197-199 above.

State for a loan contracted by a local body or a secondary territorial authority imposes on that State a special obligation that may even, in the event of default by the principal debtor, lead to assumption of the debt by the guarantor State. The question is what becomes of this *State obligation* in respect of a local public debt contracted for the particular needs of a territory that has been transferred from one State to another.

240. While he cannot be sure that his research has been exhaustive, the Special Rapporteur has not found any precedents for this situation in State practice. However, once it is agreed that specialized State debts relating to the transferred territory pass to the successor State, it seems even more logical to favour the transfer to that successor State of a guarantee for a local debt, which necessarily follows the transferred territory. The local debt concerns only the ceded territory, whose debt it formerly was, and continues to be after the territorial change. As for the guarantee, it was given by the predecessor State, and it would seem natural that it should become an obligation transferred to the successor State.

241. A draft article might consequently be proposed specifying that this guarantee is transferred to the successor State. A definition of the "local debt", backed by the State guarantee, is probably necessary. It will subsequently be combined with the other definitions to form a chapter on use of terms.

It will be recalled that the Special Rapporteur provided the various elements for a definition of local debts when he discussed the various categories of debts in order to single out State debts. A local debt was accordingly described as a debt "(*a*) that is contracted by a territorial authority inferior to the State; (*b*) to be used by that authority in its own territory; (*c*) such territory has a degree of financial autonomy; (*d*) with the result that the debt is identifiable".[179] However, the Special Rapporteur offered these criteria as constituent elements of a definition of local debts in order to set off the definition of State debts, and the Commission may find this definition unnecessarily detailed for the limited purposes involved here. If so, only one or two simple elements of the definition could be used, together with a reference to the fact that the local debt may also have been contracted by a local public body or enterprise.[180]

242. For the present, then, there would be the following two articles:

Article L. Definition of a local debt

For the purposes of the present articles, local debt means a public debt contracted by an autonomous territorial authority or public body to meet the special needs of a particular part of territory.

[*Variant:*

Article L'. Definition of a local debt guaranteed by the State

For the purpose of the present articles, local debt guaranteed by the State means a public debt contracted, with the guarantee of the State, by an autonomous territorial authority or public body to meet the special needs of a particular part of territory.]

[179] See para. 28 above.

[180] The Special Rapporteur so indicated when he contrasted State debts with debts of public enterprises (see paras. 30-32 above).

Article M. Transfer to the successor State of the obligation arising from the guarantee provided by the predecessor State for a local debt relating to the transferred territory.

When part of the territory of a State is transferred by one State to another State, the guarantee provided by the predecessor State for a local debt relating to the transferred territory shall, unless otherwise stipulated by treaty, be assumed by the successor State.

E. Exclusion of local debts contracted for local needs

243. These are debts proper to the transferred territory. Before State succession took place, they had never been included among the liabilities of the State to which the territory belonged. The occurrence of State succession does not have the effect of transforming these local debts into State debts suddenly devolving on the predecessor State and thus transferable to the successor State. The personal debts of a transferred territory relate to local interests and should quite naturally remain the responsibility of that territory. They are excluded from the present study.

F. Recapitulation of the draft articles proposed in this chapter

(1) General debt of the predecessor State

Article X. Definition of general State debt

For the purposes of the present articles, general State debt means a State debt contracted by a central State body to meet the general needs of the State.

Article Y. Exoneration of the successor State from any participation in the general debt of the predecessor State

When part of the territory of a State is transferred by that State to another State, the successor State shall assume no part of the general debt of the predecessor State unless otherwise stipulated by treaty.

or

Article Z. Contribution of the successor State to part of the general debt of the predecessor State

When part of the territory of a State is transferred by that State to another State, the contribution of the successor State to the general debt of the predecessor State shall be settled by treaty.

In the absence of a treaty, the successor State shall assume a part of the general debt of the predecessor State proportionate to the contributory capacity of transferred territory.

or

Article YZ. Conditions for contribution of the successor State to a portion of the general debt of the predecessor State

When part of the territory of a State is transferred by that State to another State, the contribution of the successor State to the general debt of the predecessor State shall be settled by treaty.

In the absence of a treaty, the successor State shall be obligated for a part of the general debt of the predecessor State only if the contributory capacity of the transferred territory was of significant importance to the predecessor State.

In that case, the part of the general debt of the predecessor State to be borne by the successor State shall be determined on the basis of the previous contribution of the transferred territory to the financial resources of the predecessor State.

(2) Special debts of the predecessor State

Article A. Definition of a special State debt (or localized State debt)

For the purposes of the present articles, special State debt (or localized State debt) means a State debt contracted by a central State organ to meet the special needs of a particular territory.

Article B. Assumption of special State debts by the successor State

When part of the territory of a State is transferred by one State to another State the successor State shall, unless otherwise agreed, assume the special debts of the predecessor State relating to the transferred territory.

(3) LOCAL DEBTS GUARANTEED BY THE PREDECESSOR STATE

Article L. Definition of a local debt

For the purposes of the present articles, local debt means a public debt contracted by an autonomous territorial authority or public body to meet the special needs of a particular part of territory.

[Variant:

Article L[1]. Definition of a local debt guaranteed by the State

For the purpose of the present articles, local debt guaranteed by the State means a public debt contracted, with the guarantee of the State, by an autonomous territorial authority or public body to meet the special needs of a particular part of territory.]

Article M. Transfer to the successor State of the obligation arising from the guarantee provided by the predecessor State for a local debt relating to the transferred territory

When part of the territory of a State is transferred by one State to another State, the guarantee provided by the predecessor State for a local debt relating to the transferred territory shall, unless otherwise established by treaty, be assumed by the successor State.

244. Articles X, Y, Z, A, B, L, L′ and M above might, of course, be quite easily rearranged in due course in two articles, one bringing together the defining provisions contained in articles X, A, L and L′ and the other setting out, in separate paragraphs, the provisions of articles Y, Z, B and M.

CHAPTER V

Succession to debts in the case of newly independent States

A. Introduction

245. In the case of newly independent States, the problems relating to succession of States with respect to public debts have special aspects which, for the most part, make it more difficult to find acceptable and practical solutions. These special problems involve:

(*a*) In the case of decolonization, determining the categories of debt covered by this study on succession to "State debts";

(*b*) Determining the degree of financial autonomy of dependent territories at the time when the debts affecting them were contracted;

(*c*) Related to the question of budgetary autonomy, the problem of the allocation of the proceeds of the loan to the dependent territory, the actual utilization of the proceeds in that territory and, ultimately, the benefits it derived therefrom for its development;

(*d*) The political circumstances surrounding the change of sovereignty over the territory concerned, and the manner, whether peaceful or violent, in which decolonization took place;

(*e*) The significance of the precedents set by previous cases of decolonization with respect to debts (and, parallel to this, evaluation of contrary precedents related to colonization);

(*f*) The size of the financial burden to be borne by newly independent States, which inevitably imposes practical limitations on succession to debts.

Some of the points will be discussed below.

246. First, however, an objection has to be disposed of. It has been argued that decolonization is a closed chapter, belonging virtually only to the history of international relations. According to this argument, there is no need to include such cases in the typology of States succession. The Commission discussed this matter at its twenty-eighth session.[181] In point of fact, the chapter is not yet completely closed. Important parts of the world are still dependent, some, indeed, covering only small areas, but others larger, for example Rhodesia and Namibia in southern Africa, or Western Sahara in West Africa. Again, from another point of view, decolonization is still far from complete. If decolonization is taken to mean the end of a political relationship based on domination, it has reached a very advanced stage. Economic relations, however, which are vital, are much less easily cured of the effects of domination than political relations. Political independence is not real independence, and newly independent States long remain subject to domination in fact because their economy is dependent on the former metropolitan country, to which it remains firmly bound for many years.

247. It cannot be denied that the draft articles on succession to debts could prove useful not only to territories that are still dependent, for example Rhodesia, Namibia, Western Sahara, French Somaliland and Djibouti, Bermuda, Puerto Rico or those parts of northern Morocco that are under Spanish domination, but also to countries that have recently achieved political independence, for example Angola, Mozambique or Guinea-Bissau, and even to those that achieved political independence 15 or 20 years ago. In fact, the debt problem, including the servicing of the debt, the progressive amortization of the principal and the payment of interest, all extending over several years if not decades, is *the most typical example of matters covered by succession that long survive political independence.* The effects of problems of State succession in respect of State debts consequently continue to make themselves felt for many decades, and certainly longer than those relating to succession to treaties or succession to State property, in connexion

[181] See in particular the explanation given by the Special Rapporteur at the 1393rd meeting (*Yearbook... 1976*, vol. I, pp. 182 *et seq.*).

with which the Commission has nevertheless devoted a chapter to decolonization.

248. Moreover, like the Commission, learned jurists continue to devote their attention to succession of States in the case of newly independent States. Recent studies, particularly those of the International Law Association,[182] show that there is still need to devote attention to the problem of decolonization.

B. Succession to public debts in the context of colonization[183]

249. Precisely because it entails a change of sovereignty benefiting the colonizing State, colonization gives rise to various problems in respect of succession of States, and in particular the problem of determining the extent to which the colonial successor State is willing or unwilling to assume responsibility for the debts of the conquered community. International practice is somewhat contradictory in this matter. Although some cases point to the acceptance of the succession as regards both liabilities and assets,[184] a much larger number of cases demonstrate the refusal of the colonial successor State to assume the financial responsibilities of the predecessor State. In so doing, the conqueror invokes various arguments, based on its sovereignty, or on the uncivilized nature of the predecessor State, or on the retention of a measure of legal personality by the subject community.

1. Refusal of succession to public debts based on the sovereignty of the successor State[185]

250. According to this argument, the colonizer exercises sovereignty over the conquered territory only by its own volition. This is an obviously voluntarist point of view. The State will incur obligations only if it so wishes and only to the extent that it so consents. From this point of view, since the successor State did not itself contract the debt concerned, it cannot be bound by the obligations of the predecessor State. This is illustrated in a particularly striking manner by the succession of States in Madagascar.

(a) *Refusal of the French Republic to succeed to the Malagasy public debts*[186]

251. The Malagasy public debt, and particularly the internal public debt, resulted of course from the financial effort made by the population of the island in its struggle against French conquest. Two loans had been granted to the Queen, in 1884-1885 and in 1893-1895. Once the conquest had been completed, the problem of the debts of the Merina monarchy arose, and on at least two occasions the successor State repudiated those debts: first in the context of the protectorate established in Madagascar and, later, following the annexation.

252. Under the second protectorate treaty, of 1 October 1895, the French Republic ruled out any possibility of succeeding to the financial commitments of the Merina State. Article 6 of the treaty provided:

> All expenditure on public services in Madagascar, as well as debt servicing, shall be covered by the Island's income.
>
> The Government of Her Majesty the Queen of Madagascar undertakes not to contract any loan without the authorization of the Government of the French Republic.
>
> The Government of the French Republic assumes no responsibility with respect to undertakings, debts or concessions contracted by the Government of Her Majesty the Queen of Madagascar before the signing of the present Treaty ... .[187]

This repudiation bears witness not only to the financial autonomy of Madagascar, but also quite simply to the free will of the French Government. The refusal was to be confirmed by the silence of the Annexation Act on this subject.

Annexation of Madagascar: silence of the Act of 6 August 1896 on the problem of the Malagasy public debts

253. This Act was preceded by a declaration by the French Government of 27 November 1895 concerning external debts, in which the following appeared:

> As regards the obligations that the Hovas themselves may have contracted abroad, we shall, without having to guarantee them for our own account, follow strictly the rules of international law governing cases in which sovereignty over a territory is transferred as a result of military action.[188]

Owing precisely to the ambiguity of this formula, it was not interpreted by anyone as implying acceptance by France of the Malagasy debt. On the contrary; according to one writer, "*it made clear that, according to official French opinion, there is no rule of international law which compels an annexing State to guarantee or to assume the debts of annexed States*".[189] This opinion was largely confirmed by the Annexation Act of 6 August 1896, which is significantly silent on the question of succession to the Malagasy debts.

If, by invoking its sovereignty, a State can refuse to assume the debts of the predecessor State, it can also, on the same voluntary ground, accept that succession. This is shown by the example of the Fiji Islands.

(b) *Acceptance of succession to debts "as an act of grace"*[190]

254. The act of grace depends eminently on the will and sovereignty of the State; and if a State chooses to accept the debt of the predecessor State, it should not be forgotten in such cases that this acceptance is an exceptional concession. The principle remains the same as in

[182] See International Law Association, *op. cit.*, p. 102.

[183] See in particular Bardonnet, *op. cit.*; D. P. O'Connell, *State Succession in Municipal Law and International Law* (Cambridge, University Press, 1967), vol. I; Sack, "La succession aux dettes publiques d'Etat", *loc. cit.*, pp. 145-326; Feilchenfeld, *op. cit.*

[184] The annexation of Tahiti was such a case: Act of 30 December 1880 (see Feilchenfeld, *op. cit.*, p. 369).

[185] Bardonnet, *op. cit.*, particularly pp. 267-281.

[186] Sack, *Les effets des transformations des Etats ...*, p. 283; Bardonnet, *op. cit.*, pp. 267 *et seq.*

[187] See Feilchenfeld, *op. cit.*, p. 372, foot-note 20.

[188] *Ibid.*, p. 373, foot-note 22; Bardonnet, *op. cit.*, p. 275.

[189] Feilchenfeld, *op. cit.*, p. 373, including foot-note 23.

[190] O'Connell, *op. cit.*, p. 376.

the Malagasy example. It consists in the refusal to accept succession to the liabilities of the conquered territory. It was only at a later date and for *reasons relating to the situation prevailing at that time* that Great Britain agreed to settle the debts of the Fiji Islands. True, the islands "were not generally recognized as a member of the family of nations", a point, observes Feilchenfeld, "not officially stressed in the correspondence of the Colonial Office".[191] This circumstance provides grounds both for denying the principle of succession in respect of the obligations of the predecessor State and for admitting that "as an act of grace" responsibility for some share of its debt might be accepted in some cases. The latter situation is rare, however, as is shown by the rejection of the Burmese debt.

2. REFUSAL OF SUCCESSION TO DEBTS ON THE GROUND THAT THE PREDECESSOR STATE IS NOT CIVILIZED: ANNEXATION OF BURMA (1886)[192]

255. A colonized State was not part of the "family of nations".[193] Consequently it was denied the application of international law, especially where this would have worked to its advantage and entailed the liability of the colonizing State for the debts of the territory it had conquered. It was simpler to decide that, given "the rudimentary condition" of the indigenous inhabitants, they had "no rights under international law".[194] A justification was thus provided, as in the case of the annexation of Burma, for refusing to succeed to a public debt on the pretext that there was no regular public debt. This was tantamount to defining an "exception of underdevelopment based on the 'non-civilized' character of the society in question".[195] Such refusal to accept succession to the debts of colonized territories had the force a principle, even though in the relations between "civilized States" it was a rule that assumption of the debt of the predecessor State was obligatory. This seems to be borne out *a contrario* by a number of cases referred to by Lord Robert Cecil, acting as lawyer for the West Rand Central Company, which establish that:

by international law, where one civilized State after conquest annexes another civilized State, the conquering State, in the absence of stipulations to the contrary, takes over and becomes bound by all the contractual obligations of the conquered State: *Calvin's case* (1609), 4 Coke, 1; *Blankard* v. *Galdy* (1693), 2 Salk. 411; *Campbell* v. *Hall* (1774), 1. Comp. 204.[196]

256. Not content with invoking its sovereignty or the "absence of civilization" of the conquered country as grounds for refusing to succeed to the debts of colonized territories, the colonizing State invoked yet a third argument, namely, the continuation in some cases of the financial autonomy of the conquered State.

3. REFUSAL OF SUCCESSION TO PUBLIC DEBTS ON THE GROUND THAT THE PREDECESSOR STATE RETAINS A MEASURE OF LEGAL PERSONALITY

257. This is the argument usually put forward when the colonization assumes for a time the form of a protectorate. The colonizing State claims that the protected State retains a degree of financial autonomy and hence must settle its debt with its own funds. There is thus refusal on the part of the colonizer to accept succession in respect of the debts of the protected State. This was demonstrated convincingly by article 6 of the second treaty relating to the protectorate over Madagascar, dated 1 October 1895, referred to above.[197] The annexation of the island was certainly not to lead to the payment by France of the Malagasy debt. The same refusal to succeed to the debts of the protected State on the pretext of the latter's financial autonomy is to be observed in the case of all the protectorates established at the end of the nineteenth century, for example, in Tunisia, Annam, Tonkin and Cambodia.[198]

258. Similar behaviour on the part of the colonizer may be observed in the annexation of the "independent State" of the Congo by Belgium in 1908.[199] The treaty of cession of 28 November 1907, which in article 3 dealt with the succession of Belgium in respect of "all the liabilities and all the financial obligations of the independent State, as set forth in annex C",[200] was soon contradicted by the "colonial charter" of 18 October 1908, which provided in article 1 that:

The Belgian Congo shall be an entity distinct from the metropolitan country.

It shall be governed by its own laws.

The assets and liabilities of Belgium and of the colony shall remain separate.

Consequently, the service of the Congolese debt shall remain the exclusive responsibility of the colony, unless otherwise provided by law.[201]

259. Other examples could no doubt be cited. They would only confirm the indisputable fact that the colonizing States that call for succession to their debts in connexion with the contemporary decolonization process are the selfsame States that refused, on a variety of grounds, to succeed to the debts of the States which they colonized. Equity requires that these precedents, among others, should be taken into account.

C. State debts and decolonization: categories of debts covered

260. Before analysing State practice and various legal theories, it should be made very clear what is meant by State debts in the case of decolonization. Such clarifi-

[191] Feilchenfeld, *op. cit.*, p. 293.

[192] O'Connell, *op. cit.*, p. 378.

[193] Feilchenfeld, *op. cit.*, p. 287.

[194] J. Westlake, *Chapters on the principles of international law* (Cambridge, University Press, 1894), p. 144.

[195] Bardonnet, *op. cit.*, p. 268, foot-note 7.

[196] Quoted by Sack, *op. cit.*, p. 282.

[197] Para. 252.

[198] See in particular Feilchenfeld, *op. cit.*, pp. 369-371; Bardonnet, *op. cit.*, p. 269; O'Connell, *op. cit.*, p. 377.

[199] Feilchenfeld, *op. cit.*, p. 375.

[200] G. F. de Martens, ed., *Nouveau Recueil général de traités* (Leipzig, Weicher, 1910), third series, vol. II, p. 102.

[201] *Ibid.*, p. 109.

cation is absolutely essential if the tangle of different positions is to be sorted out. Jèze writes:

The precedents in this matter are interesting to study but are very varied; it is impossible to discern in them the application of a single legal theory. Moreover, they should not be assigned crucial importance: ideas have evolved considerably in the nineteenth and twentieth centuries. [202]

He then cites two contrary examples of the treatment of debts "when in fact the situations were similar" (the case of the independence of the American colonies, which refused to assume responsibility for the debt, and the case of the liberation of the colonies in Spanish America, which accepted part of the Spanish debt). This is true, but it would certainly be even more difficult to understand the welter of precedents or legal theories if the same types of debt were not referred to in each case.

It is necessary to specify the types of public debt that can exist when a dependent territory accedes to sovereignty.

1. Exclusion of debts proper to the dependent territory and contracted by one of its authorities

261. A *first category of debts* includes those that the dependent territory itself might have contracted in the exercise of its financial autonomy and through the intermediary of its central authority (Governor-General of a colony, Resident-General of a protectorate, as in certain former French dependencies. High Commissioner or Viceroy, as in other, formerly British, possessions). The non-indigenous colonial central authority is considered, through a legal fiction of colonization, an organ proper to the dependent territory. Such debts are therefore *proper to the territory*. They are the responsibility of the territory and of it alone. It should be stressed that what is at issue here is debts contracted *prior to the achievement of independence* by the territory in question and hence prior to State succession.

262. This category of debts does not concern the present study. The first reason that might be given to justify this assertion is that such debts were not the debts of a "State" but rather of a "dependent territory" that had not yet attained the status of a State. The nature of a debt is determined, from the standpoint of the status and personality of the debtor, at the time when the debt is contracted. In the present case, the debt was incurred prior to the independence of the territory, which did not yet exist as a State.

263. A second and still more compelling reason demands the exclusion of this category of debts from the scope of the present study. Succession of States is not concerned with what becomes of debts proper to a transferred territory; basically, it should answer the key question of what becomes of *the debts of the predecessor State*, and of those debts alone. The theory and practice of State succession will have fulfilled their objective when they have shown whether, under what conditions, to what extent and in what proportion a particular debt may be transferred to the successor State.

264. Two circumstances are apt to create misconceptions or confusion in a situation that should remain clear in respect of this first category of debts proper to the dependent territory.

First, it may be observed that the newly independent State, which clearly has the status of successor State, has assumed these debts that are proper to the territory. However, the transfer of these debts to the successor State should not lead to the erroneous conclusion that they were transferred to it by the predecessor State as if they were latter's own debts. The successor State has in fact succeeded to them, but for a reason that is simpler and in any case unrelated to a claim that they are debts of the predecessor State. The fact is that the transferred territory and the territory of the successor State coincide geographically in the case of decolonization, unlike other cases of State succession, such as that of the transfer of part of a territory. In the case of decolonization, the debts of the dependent territory are identical with those of the successor State.

265. Secondly, it may be observed that the newly independent State, or successor State, ensures the servicing of the public debt following State succession, a circumstance that could create the false impression that it had inherited the debt by the mere fact of succession of States. Such, however, is not the case. For the dependent territory, and as regards the debts proper to it, State succession will have constituted a change of circumstances that will not have detracted from its obligation to assume—before, during and after succession—the servicing of the debt concerned. As regards this prior debt, proper to the dependent territory, that territory will have assumed the relevant obligations before accession to independence and during the phase in which State succession occurs. The fact that it continues to service the debt after State succession in no way signifies that it is liable for that debt under the rules of succession. The debt passes, as it were, through the phase of State succession without undergoing any change.

266. The fact that prior debts proper to the dependent territory may have been contracted with the administering Power is irrelevant as a justification for including them in the present study. The status of the creditor—whether a third State or the predecessor State—does not affect the issue. Indeed, if prior debts proper to the dependent territory were to be discussed here only because they had been contracted with the administering Power, it would be necessary in this study to deal with the *debt-claims of the predecessor State*, whereas the study is confined to that State's debts. The prior debts proper to the dependent territory are in fact identical with the debt-claims of the predecessor State if they were contracted with the administering Power.

267. Some time before his death, during an official visit to French-speaking Africa, the President of the French Republic, Mr. Georges Pompidou, decided to cancel a debt of about 1 billion francs owed by 14 African coun-

[202] Jèze, "L'emprunt dans les rapports internationaux ...", *loc. cit.*, p. 76.

tries, including Madagascar. [203] That gesture, which was well received, does not fall within the scope of this study because, it may be recalled, the study is concerned not with the debt-claims of the predecessor State (in this case France), which are State property, but with the debts of that predecessor State.

268. By stating that prior debts proper to the dependent territory are outside the scope of the present study—and noting in passing that they are normally assumed by the successor State, since an identical territory is involved—the Special Rapporteur does not wish to assert that they must *in all circumstances* and *in all certainty* be assumed by the newly independent State. Such debts may be the subject of a dispute between the former administering Power and the successor State if the legitimacy of their inclusion in the autonomous budget of the dependent territory is subsequently contested by the newly independent State. It is possible—as has in fact occurred—to contest the power of the colonial authorities legitimately to commit the dependent territory (debts incurred without the consent of the inhabitants). It is also possible to question the utility of the loan for the development of the territory. That is the case with debts that were included in the autonomous budget of the colony when in fact they served to finance repression of the independence movement of the territory, development of lands colonized or settled by people from the metropolitan country, or promotion of an economy that was strictly complementary to that of the administering Power—an economy geared chiefly to the satisfaction of the latter's economic interests and proving difficult and costly to reconvert at the time of independence.

269. Thus Cuba liberated itself from Spain in 1898 (only to become a United States protectorate) and refused to assume the Spanish debts that had been used to attempt to repress the national liberation movements in the island. [204] Similarly, Indonesia refused to assume as debts proper to the dependent territory those contracted by the Netherlands to repress various Indonesian insurrectionary movements. [205] Algeria, as the last of the few examples cited, contested the inclusion in its autonomous budget on the eve of independence of debts relating to the financing of the struggle against its war of national liberation. [206]

270. However, the fact that such problems arise from time to time in the course of this study is clearly due less to the erroneous characterization of debts of this kind as prior debts proper to the dependent territory than to their true nature as State debts—debts of the predecessor State.

[203] Act No. 74-648 of 18 July 1974 laying down the definitive regulations governing the 1972 budget, article 20, which "definitively cancels the outstanding entries in the account entitled 'Loans from the Economic and Social Development Fund', as well as the balance remaining payable as at 1 July 1972 from the advances granted for the financing" of the development programmes of those countries (*Journal officiel de la République française, Lois et décrets* (Paris, 20 July 1974), 106th year, No. 170, p. 7577.

[204] See paras. 159 *et seq.* above.

[205] See paras. 169 *et seq.* above.

[206] See para. 334 below.

2. Inclusion of debts contracted by the administering Power on behalf of the dependent territory

271. A *second category of debts* is fairly similar to the first, although not so much by reason of the precedure used as by the result sought. Instead of arranging for the debt to be contracted by the central authority of the still dependent territory (for example, the Governor-General of the colony), the government of the administering Power decided to assume a commitment on behalf of the dependent territory. The loan here may have been one that the metropolitan country contracted for the needs of the colony. But although the result is the same in both cases, namely, allocation of resources for the needs of the colony, the differences in the procedures employed result in distinctive characteristics for each category of debts: where action is taken by the colonial authorities of the dependent territory, the debts in question are proper to the territory, whereas in the second case, which involves the central government of the administering Power, the debts are State debts of that Power. The latter category, therefore, unlike the first, falls within the scope of the present study.

3. Debts proper to the dependent territory guaranteed by the administering Power

272. A *third category of debts* proper to the dependent territory, assumed prior to independence, comprises debts contracted by that territory, *but with the guarantee of the administering Power*. That was the case in particular for most loans contracted between dependent territories and IBRD. [207] The latter required a particularly sound guarantee from the administering Power.

273. The present study is necessarily concerned with this category of debts, but to the precise extent that the administering Power, i.e. the predessor State, is itself concerned with these debts. The guarantee given is an undertaking that creates obligations on the part of the predecessor State, and the problem here is what becomes of the guarantee that the predecessor State has agreed to provide for debts that are not its own but those of the dependent territory. In other words, it is less a question of what becomes of the debt of the territory (which is in fact normally assumed by the newly independent successor State) than of what becomes of a firm guarantee provided by the administering Power.

[207] Several examples may be given: Guarantee Agreement (Northern Rhodesia—Rhodesia Railways Project) between the United Kingdom and IBRD, signed at Washington on 11 March 1953 (United Nations, *Treaty Series*, vol. 172, p. 115); Guarantee Agreement (Rhodesia Railways Project) between the Federation of Rhodesia and Nyasaland and IBRD and the United Kingdom and the Colony of Southern Rhodesia and the Territory of Northern Rhodesia, signed at Washington on 2 October 1954 (*ibid.*, vol. 201, p. 179); Guarantee Agreement (Rhodesia Railways Project) between the United Kingdom and IBRD, signed at New York on 16 June 1958 (*ibid.*, vol. 309, p. 35; Guarantee Agreement (Kenya—Land Settlement and Development Project) between the United Kingdom and IBRD, signed at Washington on 29 November 1961 (*ibid.*, vol. 426, p. 49); Guarantee Agreement (Southern Rhodesia—Electric Power Project) between the United Kingdom and IBRD, signed at Washington on 27 February 1952 (*ibid.*, vol. 159, p. 181); Guarantee Agreement (Kariba Project) between the United Kingdom and IBRD, signed at Washington on 21 June 1956 (*ibid.*, vol. 285, p. 317).

274. All guarantee agreements concluded between IBRD and an administering Power for a dependent territory include two important articles, II and III.

Article II

Section 2.01. Without limitation or restriction upon any of the other covenants in this Agreement contained, the Guarantor hereby unconditionally guarantees, *as primary obligor and not as surety merely*, * the due and punctual payment of the principal of, and the interest and other charges on, the Loan ...

Section 2.02. Whenever there is reasonable cause to believe that the Borrower will not have sufficient funds to carry out or cause to be carried out the Project in conformity with the Loan Agreement, the Guarantor will, in consultation with the Bank and the Borrower, take appropriate measures to assist the Borrower to obtain the additional funds necessary therefor.

Article III

Section 3.01. It is the mutual understanding of the Guarantor and the Bank that, except as otherwise herein provided, the Guarantor will not grant in favour of any external debt any preference or priority over the Loan ...

As may be seen, the guarantee unconditionally binds the predecessor State *as primary obligor and not as surety merely*. This type of obligation must therefore be examined and assimilated, as it were, to the study of the State debts for which the predecessor State is responsible.

4. Exclusion of debts relating to the settlement of succession of States and arising *ex post facto*

275. A *fourth category of debts of the newly independent State* must be carefully isolated from the others. These are debts that are charged to, or indeed imposed on, the newly independent State as the price, so to speak, for its accession to sovereignty. They include miscellaneous debts resulting from the take-over by the newly independent State of all public services, and assumed by it as compensation for the take-over or in respect of the repurchase of certain property.

276. This category of debts arises *during* State succession or even during the closure or discharge of succession, unlike the other categories of debts, which existed *before* the territorial change. This fourth type does not concern the present inquiry; first, because succession of States concerns debts existing at the date on which succession begins and, secondly, because subsequent debts are completely different and presuppose that the problem of succession of States has already been resolved, since they correspond to what the successor State must pay for the final settlement of State succession. They are debts *ex post* and not *ex ante*. Finally, and above all, they are not *debts of the predecessor State*—the only ones involved in succession of States—but *debt-claims* of the predecessor State against the successor State for the settlement of a dispute arising on the occasion of this succession of States.

5. Exclusion of the national public debt of the administering Power

277. A *fifth and last category of debts* that might, in theory at least, be relevant to this study are debts that were contracted by the predecessor State for its own account and for national metropolitan use, but part of which, it decided, should be borne by its various dependent territories. This category covers two kinds of cases. The first goes back to the time of the colonial empires which supplied resources and raw materials able to "cover" the metropolitan loan. It has now disappeared and is too archaic to concern the present attempt at codification. The second is not so remote but is nevertheless exceptional: in order to face a national or international danger (the First or Second World War), the colonial Power may have contracted loans to sustain its war effort and associated its overseas territories in such ventures by requesting them to contribute. Such a case, which is perfectly conceivable and has indeed occurred in practice, is to be distinguished from the case already mentioned by the Special Rapporteur, in which the war effort of the colonial Power was directed against the dependent territory itself. Here the reference is to an international war involving a number of Powers, which associate their respective dependent territories in their war efforts. However, the Special Rapporteur will disregard this fifth category of debts, which has really become quite exceptional.

278. To sum up, the following debts are not relevant to this study: prior debts proper to the dependent territory and contracted by one of its authorities; debts for the settlement of succession of States arising *ex post facto*; and national debts of the administering Power. The study will deal with prior debts contracted by the administering Power for and on behalf of the dependent territory and with prior debts contracted directly by the dependent territory but with the guarantee of the administering Power.

D. Treatment of State debts in early cases of decolonization

279. Gaston Jèze writes:

> Here are two contrary examples that concern the basic principle of participation [in debts] when in fact the situations were similar: I. in the late eighteenth century, in 1783, the *American colonies* which had become independent from England refused to make any contribution whatsoever to the British public debt; II. conversely, in the early nineteenth century, in 1823, the *Spanish-American colonies* which had revolted against the metropolitan country and had become sovereign States took over a part of the Spanish public debt. [208]

1. Independence of the Spanish colonies in America

280. The case dealt with by Jèze is one that the Special Rapporteur has disregarded as being archaic: the metropolitan country, at the time of the old colonial empires, was able to cover a part of its *own national debt* by appropriating some of the resources or raw materials of the colonies. [209] The American colonies had broken

[208] Jèze, "L'emprunt dans les rapports internationaux...", *loc. cit.*, p. 76. See also J. B. Moore, *A Digest of International Law* (Washington, D.C., Government Printing Office, 1906), vol. I, pp. 342 and 343.

[209] See para. 277 above.

with England mainly for economic and financial reasons, and it was therefore in no way surprising that they refused to take over any part of the national debt of the predecessor State.

281. If the archaic cases of unlimited colonial exploitation of all the resources of a colony are excluded, it may be observed that, with certain rare exceptions and apart from the loans contracted by the administering Power to fight European wars, it has never been maintained that a colony should contribute to a debt contracted by the metropolitan country for its own national needs. In spite of the fact that overseas possessions were considered under the colonial law of the time as a territorial extension of the metropolitan country, and forming a single territory with it, it did not occur to writers that any part of the national public debt of the metropolitan country should be imposed on those possessions. This was a natural solution, according to Jèze, because "the creditors (of the metropolitan country) could not reasonably assume that their debts would be paid out of the resources to be derived from the financially autonomous territory". [210] From this viewpoint, the precedent of the Spanish-American colonies which had revolted against Spain would indeed have been surprising *had it really had the meaning attributed to it in the literature*. However, the Special Rapporteur's investigations support the view that what was involved was not a participation of the former Spanish-American colonies in the *national* debt of the *metropolitan* territory of Spain, but an assumption by those colonies of State debts, admittedly of Spain, but contracted by the metropolitan country on behalf and for the benefit of its overseas possessions. This, then, is quite another matter. It must also be pointed out that in certain treaties there was a desire to achieve a "package deal" involving various reciprocal compensations rather than any real participation in the debts contracted by the predecessor State for and on behalf of the colony.

282. Article 7 of the Treaty of Peace and Friendship, signed at Madrid on 28 December 1836 between Spain and newly independent Mexico, reads as follows:

> Considering that the Mexican Republic, by a Law passed on the 28th of June 1824, in its General Congress, has voluntarily and spontaneously recognized as its own and as national, all debt contracted *upon its Treasury* * by the Spanish Government of the Mother Country and *by its Authorities, during the time they ruled the now independent Mexican Nation,* * until, in 1821, they entirely ceased to govern it ..., Her Catholic Majesty ... and the Mexican Republic, by common accord, desist from all claim or pretension which might arise upon these points, and declare that the 2 High Contracting Parties remain free and quit from henceforward for ever from all responsibility on this head. [211]

It is thus perfectly clear that, by its unilateral statement, independent Mexico had taken over only those debts of the Spanish State that had been contracted for and on behalf of Mexico and had already been charged to the Mexican Treasury.

283. Article 5 of the Treaty of Peace, Friendship and Recognition, signed at Madrid on 16 February 1840 between Spain and Ecuador, in turn provided that:

> The Republic of Ecuador ... [recognizes] voluntarily and spontaneously *every debt contracted upon the credit of its Treasury, whether by direct orders of the Spanish Government or by its authorities established in the Territory* * of Ecuador, provided that such debts are always registered in the account books belonging to the treasuries of the ancient kingdom and presidency of Quito, or provided that it is shown through some other legal and equivalent means that they have been contracted within the said Territory by the said Spanish Government and its authorities while they administered the now independent Ecuadorian Republic, until they ceased governing it in the year 1822 ... [212]

284. It will be noted that, in terms of the different categories of "colonial" debts established in this study, [213] the same approach is adopted in the two treaties to *State debts of Spain* contracted by the latter for and on behalf of the dependent territory and to debts contracted by an *organ of the colony*, the latter being in fact debts proper to the dependent territory. However, the solution whereby both categories of debts passed to the successor was legally correct, although that would not have been the case had it been demonstrated that they were debts of Spain improperly charged to the treasury of the colony, as occurred later in the Cuban affair of 1898. [214]

285. A provision more or less similar to the one in the other treaties mentioned above may be found in article V of the Treaty of 30 March 1845 between Spain and Venezuela, in which Venezuela recognized.

> as a national debt ... the sum to which the debt owing by the Treasury of the Spanish Government amounts and which will be found entered in the ledgers and account books of the former Captaincy-General of Venezuela, or which may arise from other fair and legitimate claims. [215]

Very similar wording occurs in article IV of the Spanish-Argentine treaty of 9 July 1859 and in article IV of 19 July 1870 between Spain and the Eastern Republic of Uruguay. [216]

286. A single case, to the knowledge of the Special Rapporteur, is surprising because of the extent of the categories of debts assumed by the successor State, and conflicts with the other Spanish-American precedents, several of which have been recalled above. This relates to the independence of Bolivia. A Treaty of Recognition,

[210] Jèze, "L'emprunt dans les rapports internationaux...", *loc. cit.*, p. 74.

[211] *British and Foreign State Papers, 1835-1836* (London, Ridgway, 1853), vol. 24, p. 864.

[212] Marqués de Olivart, *Colección de los Tratados, Convenios y Documentas Internacionales* (Madrid, El Progresso Editorial, 1890), vol. I, pp. 144-145.

[213] See paras. 261-278 above.

[214] See paras. 159 *et seq.* above.

[215] *British and Foreign State Papers*, 1846-1847 (London, Harrison, 1860), vol. 35, p. 302.

[216] See *British and Foreign State Papers, 1859-1860* (London, Ridgway, 1867), vol. 50, p. 1161; and *ibid., 1876-1877* (1884), vol. 68, p. 459. See also article V of the Treaty between Spain and Costa Rica of 10 May 1850 (*ibid., 1849-1850* (Harrison, 1863), vol. 39, p. 1341); article V of the Treaty between Spain and Nicaragua of 25 July 1850 (*ibid.*, p. 1333); article IV of the Treaty between Spain and Guatemala of 29 May 1863 (*ibid., 1868-1869* (Ridgway, 1874), vol. 59, p. 1200); article IV of the Treaty between Spain and El Salvador of 24 June 1865 (*ibid., 1867-1868*) (1873), vol. 58, pp. 1251 and 1252) and others.

Peace and Friendship signed between Spain and Bolivia on 21 July 1847 provides in article V that:

> The Republic of Bolivia ... has already spontaneously recognized, by the law of 11 November 1844, *the debt contracted against its Treasury, either by direct orders of the Spanish Government,* * or by orders emanating from the established authorities of that Government in the Territory of Upper Peru, now the Republic of Bolivia ... and [recognizes] as consolidated debt of the Republic, in the same category as the most highly privileged debt, *all the credits, of whatever description, for pensions, salaries, supplies, advances, freights, forced loans, deposits, contracts and every other debt, either arising from the war or prior thereto*,* which are a charge upon the aforesaid Treasury, provided always that such credits proceed *from the direct orders of the Spanish Government* * or of their established authorities in the provinces which now form the Republic of Bolivia ... [217]

Consequently this article covers even war debts or régime debts, which are normally excluded from succession, and which the same administering Power—Spain—was unable to impose on Cuba in 1898. [218]

287. From all the foregoing it may be concluded that, in addition to debts contracted on behalf of the colony by a local organ of that colony (debts that should not concern this study since they are debts proper to the dependent territory which it should naturally assume after attaining independence), *the newly independent State assumed the debts contracted by the Spanish State for and on behalf of the colony.* It is perfectly clear, however, that the South American republics which achieved independence did not seek to determine whether the metropolitan country had been fully justified in including the debt among the liabilities of their respective treasuries. The inclusion of that debt in the accounts of the treasury of the colony by the metropolitan country *was based on an assumption* that the debt had been concluded on behalf and for the benefit of the colony. As will be seen in connexion with the Cuban debts in 1898, that assumption came under heavy, and indeed pulverizing, attack. As a result, the precedents set by the South American republics were not followed in subsequent cases. The same was true of the excessively broad provisions (encompassing even war debts) under which Bolivia accepted in 1847 the transfer of debts that normally should not have concerned the newly independent State.

2. Independence of the British colonies in America

288. There remains the North American precedent which, by contrast, involved the total rejection of any transfer of debts to the 13 colonies that had become independent of the British Crown. The implications of that precedent were minimized by Spain when it was involved in a confrontation with the United States in 1898. During the negotiations following the Spanish-American War, the Spanish delegation asserted that, according to certain publicists, the American colonies that had become independent had contributed £15 million to the payment of the British national debt. The United States delegation vigorously rejected that assertion, pointing out that no relevant treaty and no American text or declaration contained any stipulation of the kind referred to and that in fact no contribution to the payment of the British national debt had been agreed to by the 13 American colonies after they achieved independence. [219]

3. Independence of Brazil from Portuguese colonization

289. The North American precedent was confirmed by another when Brazil freed itself from Portuguese colonization. During the negotiations in London in 1822, the Portuguese Government claimed that part of its national debt should be assumed by the new State. In a dispatch of 2 August 1824 the Brazilian plenipotentiaries informed their government of the way in which they had opposed that claim, which they deemed inconsistent with the examples furnished by diplomatic history. The dispatch states:

> Neither Holland *nor Portugal itself,* * when they separated from the Spanish Crown, paid anything to the Court of Madrid in exchange for recognition of their independence; recently, the United States likewise paid no monetary compensation to Great Britain for similar recognition. [220]

The treaty between Brazil and Portugal of 29 August 1825 resulting from the negotiations in fact made no express reference to the transfer of part of the Portuguese State debt to Brazil. However, since there were reciprocal claims involving the two States, a separate instrument—an additional agreement of the same date—placed upon Brazil the responsibility for paying upon £2 million sterling as part of a package deal designed to liquidate those reciprocal claims.

4. End of Spanish domination of Cuba

290. The Anglo-American precedent of 1783 and the Portuguese-Brazilian precedent of 1825 were reinforced when the Latin American precedents were disregarded following the war between the United States and Spain that ended with the Peace Treaty of Paris of 1898. [221] The charging of Spanish State debts to the budget of Cuba by Spain was contested. The assumption that charging a debt to the accounts of the Cuban treasury meant that the debt had been contracted on behalf and for the benefit of the island was successfully challenged by the United States plenipotentiaries. In fact, Cuba did not succeed to the Spanish State debt relating to the island. The example virtually follows the precedent set by the 13 American colonies liberated in 1783 and the Brazilian case of 1825. The Treary of Paris of

[217] *Ibid., 1868-1869* (1874), vol. 59, p. 423.

[218] See paras. 159 *et seq.* above.

[219] Feilchenfeld, *op. cit.*, p. 54, foot-note 95.

[220] Dispatch of 2 August 1824, in *Archivo diplomático da independencia*, vol. II, p. 95, cited by H. Accioly in *Traité de droit international public* (Paris, Sirey, 1940), pp. 198 and 199 (French translation by P. Goulé). Unless the plenipotentiaries were expressing themselves somewhat loosely, which would be surprising, it was thus less a question of Brazil's taking over part of the Portuguese State public debt than of the payment of "compensation" in exchange for "recognition of independence".

[221] The literature refers to the "independence" of Cuba. But it is perfectly obvious that at that time Cuba freed itself from the domination of Spain only to become subject to that of the United States.

10 December 1898 freed Spain only from liability for debts proper to Cuba, that is, debts contracted after 24 February 1895 and the mortgage debts of the municipality of Havana; it did not allow succession to any portion of the Spanish State debt that Spain had charged to Cuba. Gaston Jèze writes in this connexion: "This national debt had not been contracted by Cuba; it had been contracted *by Spain and for Spain* * and had then been arbitrarily charged to Cuba." [222]

5. The lessons of early decolonization

291. The time has come to draw some general lessons from the decolonization of the New World.

The accession of the British colonies in America to independence (1776-1783) was accompanied by refusal to assume any part of the British State debt. The reasons for this seem quite obvious. It should be remembered that this case, unlike other cases of colonization, in no way involved racial and ethnic subjugation in addition to economic exploitation. The accession of the British colonies in America to independence involved a conflict between Europeans. The real goal of the colonies in seeking independence was in fact financial autonomy. "No taxation without representation" was the slogan of the time. The reason for the outbreak of the War of Independence was thus primarily a financial dispute. It was therefore quite natural that the American colonies, having become independent, should have been unwilling to make financial concessions. It should also be noted that independence was obtained by means of a war; hence there was rupture rather than continuity, at least in the matter of finance, which was at the heart of the dispute.

292. With regard to the achievement of independence by the Spanish-American countries in the early nineteenth century, it is necessary to stress the major fact that the Spanish State debts were assumed by a unilateral act, generally through internal laws, as was the case in Mexico, Bolivia, Guatemala and Chile, even before the conclusion with Spain of treaties that often merely took note of the provisions of these internal laws. However, none of these Spanish-American treaties contained provisions recognizing as an incontestable rule of law the principle of succession to State debts contracted by the former colonial Power in the colony. Most of the relevant treaty provisions stated that what was involved was a "voluntary and spontaneous" decision by the newly independent State and confined themselves to taking note of that fact. [223]

293. Moreover, as in the North American colonies, nineteenth-century decolonization was brought about not by the indigenous population of the South American dependent territories, but by European colonists who —like those in modern Rhodesia—had reasons for desiring a break with the metropolitan country. Contemporary international law did not recognize the existence of a rule of law to the effect that the territory that became independent should succeed to State debts. In so far as succession to debts was accepted by the former Spanish colonies in America, these precedents bear a marked similarity to the case of separation of part of a territory. The comparison is strengthened by what the aforementioned treaties significantly referred to as identity of ethnic origin between the artisans of South American secessions and the inhabitants of the Spanish "mother country". [224] These precedents could thus serve in the context of other types of State succession.

294. It should also be noted that the nineteenth-century treaties between Spain and the new South American Republics were concluded after uprisings or wars of independence that constituted a form of rupture, especially at the financial level. It had been quite easy for Spain to float loans, which it had used for its national territory or its colonies, the latter being richer than Spain itself, and it was in the interests of the overseas dependent territories to escape from the position of principal debtor in which Spain had placed them by charging the corresponding debt to their treasuries. Furthermore, the rich store of raw materials possessed by those colonies constituted both the reason for their desire for independence and the means of acquiring it. Spain was in a less advantageous position from that standpoint. In that sense, acceptance by the former colonies of the Spanish State debts more or less legitimately charged to the treasuries of the various dependent territories was the price of "peace and friendship with Spain" (a phrase that appears in the title of all the treaties concluded to end the wars of independence).

All these practical considerations lend the decolonization that occurred in North and South America in the eighteenth and nineteenth centuries its specificity and its distinctive character.

E. Treatment of State debts in decolonization occurring since the Second World War

295. It seems appropriate to recall the Special Rapporteur's intention to confine his study essentially to two categories of debts that prove to be the only ones affected by the phenomenon of succession of States properly speaking. These are, first, debts contracted by the predecessor State for and on behalf of a dependent territory and, second, debts proper to the dependent territory contracted prior to independence, but with the guarantee of the administering Power.

296. The practice of the newly independent States of Asia and Africa in respect of these two categories of debts is far from uniform. There are precedents both in favour of succession and against, and even cases of

[222] Jèze, "L'emprunt dans les rapports internationaux...", *loc. cit.*, p. 84. For more details on the Cuban case of 1898, see paras. 159 *et seq.* above; see also Feilchenfeld, *op. cit.*, pp. 329-343, and Moore, *op. cit.*, pp. 351 *et seq.*

[223] Possible exceptions are the provisions of the treaties between Spain and Argentina (9 July 1859) and Spain and Uruguay (19 July 1870 and 22 August 1882).

[224] As noted in paragraph 289 above, the Brazilian plenipotentiaries at the London negotiations told their Portuguese counterparts that a comparison could be made between the "separation" of part of Brazil from Portugal and the separation of Holland and Portugal from Spain.

repudiation of debts after their acceptance. This is apparent from a study of the cases that follow; the Special Rapporteur wished to avoid overburdening the report by including a complete catalogue of all the newly independent States.

1. Case of the Philippines (1946)

297. It was in connexion with the Philippines that Professor Rousseau could write: "This is one of the rare cases in which the transfer of debts was correctly managed". [225] What debts were these and what was the context? The answer to those two questions may perhaps be sought mainly in the Tydings-McDuffie Act of 24 March 1934. This is the Act "by which the United States created the machinery for independence of the Philippines", according to Professor O'Connell. [226]

298. The Act states (section 2, b, para. 3) the principle succession to debts contracted during the colonial period. A distinction is made, however, between the bonds issued by the Philippines with the authorization of the United States prior to 1 May 1934 *and other public debts.* It is the first of these categories of debts, involving a form of guarantee by the United States, that more directly concerns this study.

What was to become of these debts, which had been authorized, if not guaranteed, by the United States? In principle, the answer to this question was succession of the archipelago to this type of debt, as well, indeed, as to other debts. It is necessary, however, to clarify the principle by referring to the section of the Tydings-McDuffie Act concerning debts incurred subsequently to 1 May 1934, for which the United States declined all responsibility. This implies *a contrario* that, "under this provision, the American Congress acknowledged the obligation of the United States, in the event of default by the Philippines, to reimburse the public debt contracted prior to that date, following authorization given by an American law". [227]

299. To guard against any default by the Philippines, the United States had to impose "special measures regarding debts for which it believed it was assuming a certain responsibility". [228] Those measures were set out in the Act of 7 August 1939, which allocated the proceeds of export taxes to the United States Treasury for the establishment of a special fund to cover debts contracted by the Philippines with United States authorization.

300. Finally, under the Tydings-McDuffie Act of 24 March 1934, supplemented by the Act of 7 August 1939, the Philippines was never to repudiate loans authorized by the predecessor State. This principle of succession was to be confirmed by the Constitution of the Philippines of 8 February 1935 and by the Treaty between the United States and the Philippines of 4 July 1946.

[225] Rousseau, *op. cit.*, p. 450, No. 326.

[226] O'Connell, *op. cit.*, p. 433.

[227] G. Fischer, *Un cas de décolonisation—Les Etats-Unis et les Philippines* (Paris, Librairie générale de droit et de jurisprudence, 1960), p. 264.

[228] *Ibid.*, p. 265.

2. Case of India and Pakistan (1947)

301. This is yet another example of the successor State accepting the debts of the predecessor State. It would be more correct to speak of successor States; in fact this was a two-stage succession as a result of the partition, Pakistan succeeding to India, which had succeeded to the United Kingdom. As O'Connell writes:

> There was no direct repartition of the debts between the two Dominions. All financial obligations, including loans and guarantees, of the central government of British India remained the responsibility of India. [229]

302. It does not appear that many distinctions were made regarding the different categories of debt. Only one appears to have been made by the Committee of Experts. This concerned the public debt, composed of long-term loans, Treasury bonds and special loans, as against the unfunded debt, which comprised savings bank deposits and bank deposits. These various obligations were assigned to India, but it is hard to tell whether they were debts proper to the dependent territory, which would have devolved upon it in any event, or debts of the predecessor State, which would thus have been transferred to the successor State.

303. The problem to which the Committee of Experts devoted most attention appears to have been that of establishing the modalities for apportioning the debt between India and Pakistan, as is apparent from section 9 of the Indian Independence Act of 1947. An agreement of 1 December 1947 between the two States was to embody the practical consequences of this and determine the respective contributions. This division was subsequently denounced by Pakistan. (Such problems relating to separation of States will be considered in greater detail in the context of a more appropriate typology of succession.)

3. Case of Indonesia (1949-1956)

304. The debt problems arising from the succession of Indonesia to the Kingdom of the Netherlands were resolved essentially in two instruments: the Round Table Conference Agreements signed at The Hague on 2 November 1949, [230] and the Indonesian Decree of 15 February 1956 repudiating the debts, Indonesia having denounced the 1949 Agreements on 13 February.

The Financial and Economic Agreement (which was only one of the Round Table Conference Agreements) specified the debts that Indonesia agreed to assume. [231] Article 25 distinguished four series of debts: (*a*) a series of six consolidated loans; (*b*) debts third countries; (*c*) debts to the Kingdom of the Netherlands; (*d*) Indonesia's internal debts.

305. The last two categories of debts, which need not be taken into consideration in this study, may be dismissed at once.

Indonesia's debts to the Kingdom of the Netherlands were in fact debt-claims of the predecessor State, and thus

[229] O'Connell, *op. cit.*, p. 404.

[230] United Nations, *Treaty Series*, vol. 69, p. 3.

[231] *Ibid.*, pp. 252-258, draft financial and economic agreement, articles 25-27.

do not concern this study. Moreover, those debts were specifically settled in article 27 of the financial and economic agreement, which provided that:

> The remaining debts of the Body-Corporate of Indonesia to the Kingdom of the Netherlands at the date of transfer of sovereignty shall be deemed cancelled after the debts of the Kingdom of the Netherlands to the Body-Corporate of Indonesia at the same date have been offset, which involves a reduction of the external debt due to the Netherlands by the sum, calculated as of 31 December 1949, of 2 billion Netherlands guilders.

"All internal debts of Indonesia at the date of transfer of sovereignty" should also be eliminated. These debts, so described in article 25, paragraph D, of the above-mentioned agreement, are excluded by definition from this study.

306. Only the debts of the predecessor State and their assignment need concern this study. It should be noted, however, that this category was very inadequately defined and the predecessor State was later able, by adding to it unduly, to include debts that could be described as war debts or odious debts. It was in fact only after a long and hard struggle to maintain itself in the "East Indies" that the Netherlands recognized the sovereignty of Indonesia. Such undue assumption of "odious debts" may well have been a factor in the denunciation and repudiation of the debt in 1956. [232]

That leaves the first two categories of debts to be considered.

307. The consolidated debts [233] consisted of a series of loans issued before the Second World War, which some writers consider were contracted by Indonesia "on its own behalf and for its own account" [234] on the ground that Indonesia had possessed legal personality since 1912. This point of view appears very much open to question. In reality, *these loans had been contracted under Netherlands legislation*, [235] and thus by the metropolitan country for the account of the dependent territory. It should, moreover, be noted that some of the sums to be paid were only "Indonesia's share of the Netherlands National Consolidated Debt".

308. Debts to third countries, [236] according to article 25 of the financial and economic agreement, comprised the following: (1) "Loan of the Export-Import Bank on behalf of Indonesia"—this bank is a United States bank and the loan was issued under the Marshall Plan under an agreement of 28 October 1948; (2) "A line of credit granted by the United States Government to the Netherlands Indies Government for the purchase of United States surplus property (agreement of 28 May 1947)"; (3) "Loan from Canada (agreement of 9 October 1945)"; (4) "Settlement between the Government of Australia and the Government of Indonesia (agreement of 17 August 1949)".

309. The Special Rapporteur understands that, during the Round Table Conference, Indonesia brought up the problems relating to the degree of autonomy that its organs had possessed by comparison with those of the metropolitan country at the time when the loans had been contracted. The Indonesian plenipotentiaries also, and in particular, referred to the problem of the assignment, utilization of and benefit derived from those loans by the territory. However, there appears to be no doubt that the results of the negotiations at The Hague constituted a package deal, as often occurs in such cases. Moreover, it should not be forgotten that at that time the negotiations had led to the creation of a "*Netherlands Indonesian Union*". When that Union was dissolved in 1954, the Round Table Conference Agreements of 1949 lost their validity. Indonesia's repudiation of all debts occurred in 1956.

4. Case of Libya

310. As far as Libya is concerned, the General Assembly of the United Nations resolved the problem of succession of States, including succession to debts, in resolution 388 A (V), of 15 December 1950, entitled "Economic and financial provisions relating to Libya", article IV of which stated that "Libya shall be exempt from the payment of any portion of the Italian public debt".

5. Case of Guinea (1958)

311. Guinea acceded to independence in 1958, following its negative vote in the constitutional referendum of 28 September of the same year establishing the Fifth Republic and the French Community. "Rarely in the history of international relations has a succession of States begun so abruptly", writes Professor Gonidec. [237]

Since that time, relations between the former colonial Power and the new State have been particularly difficult. The implementation of a monetary reform in Guinea led to that country's leaving the franc area. In addition, diplomatic relations were long severed. This combination of factors was not conducive to the swift solution of problems of State succession arising some 20 years earlier. However, a trend towards settlement seems to have emerged since the resumption of diplomatic relations between the two States in 1975. But apparently the problem of debts has not assumed significant importance in the relations between the two States; it seems to be reduced essentially to questions regarding civilian and military pensions.

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[232] See "L'Indonésie répudie sa dette envers les Pays-Bas", in *Libre Belgique* of 12 August 1956, reproduced in: France, Présidence du Conseil et Ministère des affaires étrangères, *La documentation française—Problèmes économiques* (Paris, 28 August 1956), No. 452, pp. 17 and 18.

[233] Paenson, *op. cit.*, p. 77.

[234] Rousseau, *op. cit.*, p. 451. On the same subject, see O'Connell, *op. cit.*, p. 437.

[235] Details of these loans are given in article 25 of the financial and economic agreement of 2 November 1949.

[236] Paenson, *op. cit.*, p. 77.

[237] Quoted by G. Tixier, "La succession à la régie des chemins de fer de l'AOF", *Annuaire français de droit international, 1965*, vol. XI (Paris, 1966), p. 921.

6. Case of Madagascar (1960) [238]

(a) *Type of debts to which State succession applied in Madagascar*

312. According to the definition adopted by the Special Rapporteur, succession to dets concerns only debts contracted by the predecessor State on its own initiative but on behalf of the colony, or loans subscribed by the latter but guaranteed by the administering Power.

In Madagascar, the types of debts fell for the most part into the latter category. Madagascar, like all former French overseas territories in general, had legal personality, implying a degree of financial autonomy. The island was thus able to subscribe loans and exercised that right on the occasion of five public loans, in 1897, 1900, 1905, 1931 and 1942.

313. These loans constituted debts proper to Madagascar, at least at first sight, and thus should not come within the scope of the present study. In fact, however, they remained subject to a legal régime implying so great a degree of intervention on the part of the metropolitan administering Power that they could rightly be considered debts of the latter, at least as regards the guarantee given by it, without which the loans would not have been granted.

(b) *Legal régime governing the Malagasy loans*

314. Two stages can and must be distinguished: (*a*) that of the apparent decision, falling within the competence of the dependent territory; (*b*) that of the actual decision, falling within the competence of the administering Power.

315. The *decision of principle* to issue the loan was made in Madagascar by the Governor-General, who was given the views of various administrative organs and economic and financial delegations. Had the process stopped there, and had it been possible for the public actually to subscribe to the loan, the debt would have been contracted simply on the basis of the financial autonomy of the dependent territory. It would then have had to be termed a "debt proper to the territory" and could not have been attributed to the predecessor State; consequently, it would not have been considered in the present report. [239]

316. In fact, *the effective decision* depended upon the administering Power, so that the decision-making process, begun in Madagascar, was completed *only within the framework of the laws and regulations of the central government of the administering Power*. Approval could have been given either by a decree adopted in the Conseil d'Etat or by statute. In fact, all the Malagasy loans were subject to legislative authorization by the metropolitan country. [240]

317. This authorization constituted a substantive condition of the loan, a *sine qua non* for the issue of the loan. That would appear to demonstrate the insufficiency of the financial autonomy of the dependent collectivity. Power to enter into a genuine commitment in this regard lay only with the administering Power which, by so doing, assumed an obligation that might be compared with the guarantees required by IBRD, which confer on the predecessor State the status of "primary obligor" and not of "surety merely". [241]

To these theoretical considerations must be added practical considerations, as a result of which, in the final analysis, those who issue the loan enter into a commitment only upon intervention by the administering Power, on which they confer, in a sense, the "status" of "primary obligor".

(c) *Treatment of the debts*

318. The debts were assumed by the Malagasy Republic, which did not dispute them, and Professor Bardonnet was able to conclude that Madagascar "thus seems to have conformed spontaneously to international custom in this respect". [242] The negotiators of the Franco-Malagasy Agreement on co-operation in monetary, economic and financial matters of 27 June 1960 thus did not have to work out any special provisions for this succession, which placed an obligation on Madagascar as though, as Professor Bardonnet notes, "the automatic character of the transfer ... were self-evident". [243]

7. Case of the former Belgian Congo (1960)

319. The Congo acceded to independence on 30 June 1960, in accordance with article 259 of the Belgian Act of 19 May 1960 concerning the structures of the Congo. Very swiftly came foreign intervention, civil war and the severance of diplomatic relations between the two States from 1960 to 1962. These circumstances were to delay the solution of the problems of succession of States, which took place only five years later, in two conventions dated 6 February 1965. The first related to "the settlement of questions relating to the public debt and portfolio of the Belgian Congo Colony". [244] The second concerned the statutes of the "Belgo-Congolese Amortization and Administration Fund". [245]

Classification of debts

320. The classification of debts was set ont in article 2 of the Convention for the settlement of questions relating

[238] To avoid a cumbersome list, the Special Rapporteur will confine himself to the case of Madagascar to illustrate the decolonization, in 1960, of the countries of French-speaking black Africa. He has available for this purpose a particularly scholarly work, that of Daniel Bardonnet: *La succession d'Etats à Madagascar—Succession au droit conventionnel et aux droits patrimoniaux* (Paris, Librairie générale de droit et de jurisprudence, 1970). See in particular pp. 645-659.

[239] For a different reason, the first Malagasy loan of 1897 must be set aside. It was subscribed for a term of 60 years, and redemption was completed in 1957. Whether it is defined as a debt exclusive to the territory or a debt of the metropolitan country, this loan clearly does not concern succession of States. It remains an exclusively colonial affair. The other loans, by contrast, concern succession of States because their financial consequences continued in the context of decolonization.

[240] See Act of 5 April 1897; Act of 14 April 1900; Act of 19 March 1905; Act of 22 February 1931; Act of 16 April 1942. For further details, see the table of Malagasy public loans in Bardonnet, *op. cit.*, p. 650.

[241] See para. 274 above.

[242] Bardonnet, *op. cit.*, p. 654.

[243] *Ibid.*

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

[245] *Ibid.*, p. 275.

to the public debt, which distinguished three categories of debts: 1. "Debt expressed in Congolese francs and the debt expressed in foreign currencies held by public agencies of the Congo as at 30 June 1960"; 2. "Debt expressed in foreign currencies and guaranteed by Belgium"; 3. "Debt expressed in foreign currencies and not guaranteed by Belgium (except the securities of such debt held by public agencies of the Congo)".

In other words, this classification led ultimately to a distinction between the internal debt and the external debt.

321. *The internal debt* will not engage the attention of the Special Rapporteur for long, not because it was internal but because it was held by public agencies of the Congo, [246] or, as one writer specifies, three quarters of it was. [247] It was thus merged with the debts of the public services, and hence cannot be regarded as a State debt of the predecessor State. What must now be considered is the external debt.

External debt

322. This debt was subdivided into guaranteed and non-guaranteed external debt. The first subdivision unquestionably merits the attention of the Special Rapporteur. The second, however, raises some thorny problems.

(a) *External debt guaranteed or assigned by Belgium*

323. This guarantee extended to two categories of debts, which are set forth in schedule 3 annexed to the aforementioned convention. [248]

The first concerned the Congolese debt in respect of which Belgium was involved only as guarantor. It was a debt denominated in foreign currencies (United States dollars, Swiss francs or other). In this category may be mentioned the loan agreements concluded between the Belgian Congo and IBRD, which are referred to in article 4 of the Belgo-Congolese agreement. The guarantee and liability of Belgium could naturally not extend, with regard to the IBRD loans, beyond "the amounts withdrawn by the Belgian Congo ... before 30 June 1960", i.e. before independence. When it granted its guarantee, Belgium apparently intented to act "as primary obligor and not as surety merely". In the terms of the agreements with IBRD, this character of State debt of the predecessor State emerges even more clearly in the case of the second category of debts guaranteed by Belgium.

324. The second type of external debt was what is known as an *assigned debt*; it covered "loans subscribed by Belgium, the proceeds of which were assigned to the Belgian Congo". [249] This is a particularly striking illustration of a State debt of the predecessor State. Belgium was no longer a mere guarantor: the obligation fell directly on Belgium, and it alone was the debtor.

325. Responsibility for the two types of debt, guaranteed and assigned, was to rest with Belgium. That is what was provided in article 4 of the Convention for the settlement of questions relating to the public debt, in the following terms:

> 1. Belgium shall assume sole liability in every respect for the part of the public debt listed in schedule 3, which is annexed to this Convention and which forms an integral part thereof. [The contents of schedule 3 have just been analysed.]
>
> ...
>
> 2. With regard to the Loan Agreements concluded between the Belgian Congo and the International Bank for Reconstruction and Development, the part of the public debt referred to in paragraph 1 of this article shall comprise only the amounts withdrawn by the Belgian Congo, under those Agreements, before 30 June 1960.

(b) *External debt not guaranteed by Belgium*

326. This debt, which was expressed in foreign currency in the case of the "Dillon loan" issued in the United States and in Belgian currency in the case of other loans, was owed, as one writer says, to "people who have been referred to as 'the holders of colonial bonds' ". [250] "Ninety-five per cent of them", he states, "were Belgians". Here, it seems, was a type of "colonial debt" that is outside the scope of this study. It might, however, be relevant if Professor Rousseau's view is adopted "that the financial autonomy of the Belgian Congo was purely formal in nature and that the administration of the colony was completely in the hands of the Belgian authorities". [251]

327. However, neither Belgium nor, much less, the Congo agreed that the debt devolve upon it, and the two countries avoided the difficulty by setting up a special international agency to handle the debt. That is the significance of articles 5 to 7 of the Convention for the settlement of questions relating to the public debt, which established a Fund. [252]

328. The establishment of the Fund, as an *institution of public international law*, and the arrangement for joint contriburions to it, had two consequences:

1. In no sense did this imply that the two States were accepting the status of debtors. That is made clear by article 14 of the Convention:

> The settlement of the public debt of the Belgian Congo, which is the subject of the foregoing provisions, constitutes a solution in which each of the High Contracting Parties reserves its legal position with regard to recognition of the public debt of the Belgian Congo.

2. The two States nevertheless regarded the matter as having been finally settled. That is stated in the first paragraph of article 18 of the Convention:

> The foregoing provisions being intended to constitute a final settlement of the problems to which they relate, the High Contract-

[246] A list of these agencies and funds is annexed to the Convention: *ibid.*, p. 253.

[247] C. Lejeune, "Le contentieux financier belgo-congolais", *Revue belge de droit international*, No. 2 (Brussels, 1969), p. 546.

[248] United Nations, *Treaty Series*, vol. 540, p. 255.

[249] *Ibid.*, p. 257.

[250] Lejeune, *loc. cit.*, p. 546.

[251] Rousseau, *op. cit.*, p. 453.

[252] See article 5, paragraph 1, of the Convention:

> Belgium and the Congo jointly establish, by this Convention, an autonomous international public agency to be known as "the Belgo-Congolese Amortization and Administration Fund", hereinafter referred to as "the Fund". The Statutes of the Fund shall be established by a separate Convention.

The Fund was to receive an annual contribution in Belgian francs from the two States, two fifths of which was to come from Belgium and three fifths from the Congo (article 11 of the Convention).

ing Parties undertake to refrain in the future from any discussion and from any action or recourse whatsoever in connexion either with the public debt or with the portfolio of the Belgian Congo. Each Party shall hold the other harmless, fully and irrevocably, for any administrative or other act performed by the latter Party in connexion with the public debt and portfolio of the Belgian Congo before the date of the entry into force of this Convention.

8. Case of Algeria (1962)

329. Article 18 of the Declaration of Principles concerning Economic and Financial Co-operation contained in the Evian Agreement, [253] provided for the succession of the Algerian State to France's rights *and obligations* in Algeria. However, neither this declaration of principles nor the others contained in the Evian Agreements referred specifically to public debts, much less to the various categories of such debts, so that Rousseau and O'Connell took the view that the Agreements were silent on the matter. [254]

330. Negotiations on public debts were conducted by the two countries from 1963 until the end of 1966. They resulted in a number of agreements, the most important of which was that of 23 December 1966, which settled the financial differences between the two countries through the payment by Algeria to France of a lump sum of 400 million francs (40 billion old francs). Algeria does not seem to have succeeded to the "State debts of the predecessor State" by making the payment; had that been the case, it would have paid the money not to the predecessor State, which would by definition have been the debtor, but to any third parties to which France owed money in connexion with its previous activities in Algeria. What was involved was, rather, debts to which the Special Rapporteur has referred in his set of definitions as miscellaneous debts resulting from the take-over of all public services by the newly independent State, assumed by it as compensation for that take-over or in respect of the repurchase of certain property. Also included were *ex post facto* debts covering what the successor State had to pay to the predecessor State as a final settlement of the succession of States. Algeria was not assuming France's State debts (to third States) connected with activities in Algeria.

331. In the negotiations, Algeria argued that it had agreed to succeed to France's "obligations" only in return for certain French commitments to independent Algeria. Under the aforementioned Declaration of principles, a "French contribution to Algerian economic and social development" and "facilities for marketing Algerian surplus products [wine] in France" [255] were to be the *quid pro quo* for the obligations assumed by Algeria under Article 18 of the Declaration. The Algerian negotiators maintained that such a "contractual" undertaking between Algeria and France could be regarded as valid only if two conditions were met: (*a*) if the respective obligations were properly balanced, and (*b*) if the financial situation inherited by Algeria was a sound one. With regard to the first condition, France's annual contribution had so dwindled that it was rapidly approaching zero, and exports of Algerian wine to France had been halted. With regard to the second condition, the Algerian delegation noted that the treasury inherited by Algeria under an agreement of 31 December 1962 had been so heavily encumbered with debts that the "liquid assets" were in fact a minus quantity.

332. Algeria also refused to assume debts representing loans contracted by France for the purpose of carrying out economic projects in Algeria during the war of independence. The Algerian delegation argued that the projects had been undertaken in a particular political and military context, in order to advance the interests of the French settlers and of the French presence in general, and that they were part of France's over-all economic strategy, since virtually the whole of France's investment in Algeria had been complementary in nature. The Algerian delegation, also pointed out that the departure of the French population during the months preceding independence had resulted in massive disinvestment and that Algeria could not pay for investments at a time when not only had the corresponding income dried up but, in addition, a process of disinvestment had developed.

333. The Algerian negotiators noted that a substantial part of the economic programme in Algeria had had the effect of incurring debts for that country while it still had dependent status. They argued that, during the seven and one half years of war, the administering Power had for political reasons been overgenerous in pledging Algeria's backing for numerous loans, thus seriously compromising the Algerian Treasury.

334. Finally, the Algerian negotiators refused to assume certain "odious debts" or war debts that France had charged to Algeria (payment of compensation under the territorial budget to the victims of what was referred to at the time as "Algerian terrorism", assumption of expenditures in connexion with the establishment and maintenance of the *harki* force [composed of Algerian collaborators with the colonial Power], etc.).

335. This brief account, which shows the extent of the controversy surrounding even the designation of the debts (French State debts, or debts proper to the dependent territory), gives only the merest suggestion of the complexity of the Algerian-French financial dispute, which the negotiators finally settled at the end of 1966. [256]

F. Financial burden of newly independent States

336. International law cannot be codified or progressively developed in isolation from the current political and economic context. The rules that the Commission proposes to the international community must reflect

[253] Exchange of letters and declarations adopted on 19 March 1962 at the close of the Evian talks, constituting an agreement between France and Algeria: United Nations, *Treaty Series*, vol. 507, p. 25.

[254] Rousseau, *op. cit.*, p. 454, and O'Connell, *op. cit.*, pp. 444-446.

[255] United Nations, *Treaty Series*, vol. 507, pp. 56 and 58.

[256] Facile conclusions and definitive judgements should therefore be eschewed. See C. Rousseau, "Chronique des faits internationaux—Algérie et France", *Revue générale de droit international public*, 3rd series, vol. XXXVIII, No. 3 (Paris, July-Sept. 1967), pp. 271 and 722, and *Droit international public* (*op. cit.*), p. 454.

that community's concerns and needs. For that reason, a set of rules concerning State debts for which newly independent States are liable cannot be evolved without to some extent taking account of the catastrophic and indeed intolerable situation in which a number of newly independent States find themselves.

337. Unfortunately, there is a lack of statistical data that would make it possible to determine accurately how much these countries' disastrous and extensive debt problem is due to their having attained independence and assumed certain debts in connexion with succession of States, and how much to the loans that they have had to contract as sovereign States in an attempt to overcome their underdevelopment. [257] Similarly, the relevant statistics covering all the so-called developing countries cannot easily be broken down in order to individualize and illustrate the specific situation of the newly independent States since the Second World War. The figures given below relate to the external debt of developing countries; they include the Latin American countries, that is, countries decolonized a long time ago. Here the aim is not so much to calculate precisely the financial burden resulting from the assumption by the newly independent States of the debts of the predecessor States, but rather to *highlight a dramatic and widespread debt problem* affecting the majority of developing countries. This context and this situation lend special and specific overtones to succession of States in respect of newly independent States.

338. The increasingly insupportable debt problem of these countries has become a structural phenomenon, whose profound effects were apparent long before the current international economic crisis. The Commission on International Development (known as the Pearson Commission) estimated that by 1977 debt service alone, namely, annual amortization and interest payments, would exceed the total amount of new loans by 20 per cent in Africa and by 30 per cent in Latin America.

339. By 1960, the external public debt of developing countries amounted to several billion dollars. During the 1960s, the total indebtedness of the 80 developing countries studied by UNCTAD increased at an annual rate of 14 per cent, so that at the end of 1969 their external public debt amounted to $59 billion. [258] At the same date the total disbursed by those countries simply on servicing of the public debt and repatriation of profits was estimated at $11 billion. [259] Already then, in some developing countries, servicing of the public debt alone consumed over 20 per cent of their total export earnings. As at 31 December 1973, the data collected by IBRD for 86 developing countries showed a total outstanding external public debt of $119 billion, [260] or about double the amount calculated by UNCTAD in 1969 for 80 countries. Service payments on the public debt alone, excluding all other financial outflows, then amounted to $11 billion. [261]

340. This considerable increase in the external debt placed an insupportable burden on certain countries. For Zambia, for example, service payments on the external public debt represented 28 per cent of the value of exports in 1973, compared with 2.4 per cent in 1967; for Peru, the figure was 32.5 per cent compared with 3 per cent; for Uruguay, 30.1 per cent compared with 17 per cent; and for Egypt, 34.6 per cent compared with 19.5 per cent. Facing the same difficulties, India renegotiated its debt in 1971, Chile and Pakistan did so in 1972, and India again, along with Pakistan, did so in 1973. But other developing countries were in an equally alarming position:

> During the past years, a growing number of developing countries have experienced debt crises which warranted debt relief operations. Multilateral debt renegotiations were undertaken, often repeatedly, for Argentina, Bangladesh, Brazil, Chile, Ghana, India, Indonesia, Pakistan, Peru and Turkey. In addition, around a dozen developing countries were the subject of bilateral debt renegotiations. Debt crises have disruptive effects on the economies of developing countries and a disturbing influence on creditor/debtor relationships. Resource providers and recipients should therefore ensure that the international resource transfer is effected in such a way that it avoids debt difficulties of developing countries. [262]

341. The considerable acceleration of inflation in the industrialized economies since 1973 was to have serious consequences for developing countries, which depend heavily on those economies for their imports, and thus aggravated their external debt. Whereas the average annual rate of inflation had been 4 per cent from 1962 to 1972 in the industrialized economies, it rose sharply to 7.1 per cent in 1973, 11.9 per cent in 1974 and 10.5 per cent in 1975. [263] Certain countries, for example Japan and the United Kingdom, experienced inflation rates of 20.8 per cent in 1974 and 20 per cent in 1975 respectively. As a result, the prices of manufactures exported by the industrialized countries increased at an unprecedented rate, leading to a further deterioration in terms of trade to the detriment of developing countries.

342. In fact, the current deficit of these non-oil-exporting countries increased from $9.1 billion in 1973 to $27.5 billion in 1974 and $35 billion in 1976. [264] These deficits resulted in a huge increase in the outstanding external debt of developing countries and in service payments

[257] The statistics published or made available by international economic or financial organizations are not sufficiently detailed to permit a distinction to be drawn between debts contracted prior or subsequently to independence. OECD has published various studies and numerous tables giving a break-down of debts by debtor country, type of creditor and type of debt, but with no indication whether the debts are "colonial debts". See OECD, *Total external liabilities of developing countries* (Paris, 1974).

[258] UNCTAD, *Debt problems of developing countries: report by the UNCTAD secretariat* (United Nations publication, Sales No. E.72.II.D.12), para. 12.

[259] See *Proceedings of the United Nations Conference on Trade and Development, Third Session*, vol. III, *Financing and invisibles* (United Nations publication, Sales No. E.73.II.D).

[260] IBRD, *Annual report, 1975* (Washington, D.C.), p. 81.

[261] *Ibid.*, p. 97, statistical annex, table 8. See also OECD, *Development co-operation—1976 Review* (report by M. J. Williams, Chairman of the Development Assistance Committee) (Paris, 1976), pp. 41 *et seq.* and 254 *et seq.*

[262] OECD, *Debt problems of developing countries* (Paris, 1974), p. 2.

[263] IMF, "World economic outlook: General survey" (December 1975), p. 3, table 1.

[264] IMF, "World economic outlook: Development and prospects in the non-oil primary producing countries", p. 4, table 1.

on that debt in 1974 and 1975. The preliminary information available indicates that the outstanding external public debt of these countries increased by at least one third between 1973 and the end of 1975. If this information proves accurate, it would mean for 31 December 1975 *an outstanding debt of well over $150 billion* for the sample of 86 countries used by IBRD, which includes oil-exporting countries with large deficits such as Algeria and Indonesia.

343. This assumption appears to be confirmed by the results of a recent IMF study, which reveals that the total outstanding guaranteed public debt increased from about $62 billion in 1973 to an estimated $95.6 billion in 1975—an increase of one third. [265,266]

344. In addition, while the developing countries' indebtedness was increasing, the relative value of official development assistance was declining: the volume of such transfers has declined from 0.33 per cent of GNP in 1970-1972 to 0.29 per cent, although the International Development Strategy called for a minimum transfer of 1 per cent.

345. In parallel and simultaneously with this trend, there was a considerable increase in reverse transfers of resources in the form of repatriation of profits made by investors from industrialized countries in developing countries. According to data for the balance of payments of 73 developing countries, financial outflows of such profits increased from $6 billion in 1970 to $12 billion in 1973, so that the growth in absolute value of the resources transferred to developing countries in fact conceals a worsening of those countries' debt situation. It has been estimated that *the total percentage of export earnings used for debt service will be 29 per cent in 1977, compared with 9 per cent in 1965.*

346. The solutions proposed by the developing countries to remedy this dramatic situation have not met with the approval of the industrialized creditor States. The debtor countries have established quite clearly that, for all of them, *the terms of their indebtedness are such that, if they are not reconsidered, they may cancel out any development effort.* At the fourth Conference of Heads of State or Government of Non-Aligned Countries, in 1973, the problem was stated at a global level in terms that were both solemn and alarming, but by no means exaggerated. One of the texts adopted at this Conference states:

> The adverse consequences for the current and future development of developing countries arising from *the burden of external debt contracted on hard terms* * should be neutralized by appropriate international action ...
>
> Appropriate measures should be taken to alleviate the heavy burden of debt-servicing, including the method of rescheduling. [267]

347. Speaking at the sixth special session of the United Nations General Assembly, in his capacity as Chairman of the fourth Conference of Heads of State or Government of Non-Aligned Countries, the Head of State of Algeria declared:

> In this regard it would be highly desirable to examine the problem of the present indebtedness of the developing countries. *In this examination, we should consider the cancellation of the debt in a great number of cases* * and, in other cases, refinancing on better terms as regards maturity dates, deferrals and rates of interest. [268]

348. This problem has constantly been raised by the newly independent States. The cancellation of the debts of the former colonized countries had already been brought up at the second session of the United Nations Conference on Trade and Development, held in New Delhi, Mr. Louis Nègre, Minister of Finance of Mali, stated at the 58th plenary meeting:

> *Many* [developing] *countries could legitimately have contested the legal validity of debts contracted under the auspices of foreign Powers* * ... the developing countries asked their creditors to show a greater spirit of equity and suggested that, during the present Conference, they might decree ... *the cancellation of all debts contracted during the colonial period* * ... [269]

349. The United Nations General Assembly finally adopted resolution 3202 (S-VI), entitled "Programme of Action on the Establishment of a New International Economic Order", which recognized, in section II, 2, that:

> (*f*) Appropriate urgent measures, including international action, should be taken *to mitigate adverse consequences* * for the current and future development of developing countries *arising from the burden of external debt contracted on hard terms;* *
>
> (*g*) Debt renegotiation on a case-by-case basis with a view to concluding agreements on *debt cancellation,* * moratorium, rescheduling or interest subsidization.

350. A draft resolution submitted on 7 December 1976 to the Second Committee of the General Assembly of the United Nations, entitled "Debt problems of developing countries", stated that:

> (*a*) The least developed, land-locked and island developing countries should have their official debts *converted into grants;* *
>
> (*b*) Other most seriously affected countries should *receive the same treatment* * as above, or as a minimum should have their outstanding official debts recomputed at the present terms of the International Development Association *with a minimum grant element of 90 per cent;* *
>
> (*c*) Debt relief should also be provided by developed bilateral creditors and donors to other developing countries seeking relief. [270]

[265] IMF, "World economic outlook: Developments and prospects in the non-oil primary producing countries", table 8.

[266] The figures differ from those of IBRD because of differences in the countries selected, the elements studied and the method of calculation used.

[267] Fourth Conference of Heads of State or Government of Non-Aligned Countries (Algiers, September 1973), "Action programme for economic co-operation" [A/9330 and Corr.1], section entitled "International monetary and financial systems", paras. 6 and 7.

[268] *Official Records of the General Assembly, Sixth Special Session, Plenary Meetings,* 2208th meeting, para. 136.

[269] *Proceedings of the United Nations Conference on Trade and Development, Second Session,* vol. I [and Corr.1, 3 and 4, and Add.2], *Report and annexes* (United Nations publication, Sales No. E.68.II.D.14), annex V, p. 140.

[270] Draft resolution A/C.2/31/L.46/Rev.1 submitted by Bangladesh, Central African Republic, Democratic Yemen, Ethiopia, India, Pakistan, Philippines, Sudan, Uganda and United Republic of Cameroon (see *Official Records of the General Assembly, Thirty-first Session, Annexes,* agenda item 56, doc. A/31/231 and Add.1, Part II, para. 17).

351. Finally, the General Assembly, by its resolution 31/158 of 21 December 1976, entitled "Debt problems of developing countries", declared:

The General Assembly,

...

Noting with grave concern ... [the] heavy debt-service payments ...

...

Convinced that the situation facing the developing countries can be mitigated by decisive and urgent relief measures in respect of ... their official ... debts ...

Acknowledging that, in the present circumstances, there are sufficient common elements in the debt-servicing difficulties faced by various developing countries to warrant the adoption of general measures relating to their existing debt,

Recognizing the especially difficult circumstances and debt burden of the most seriously affected, least developed, land-locked and island developing countries,

1. *Considers* that it is integral to the establishment of the new international economic order to give a new orientation to procedures of reorganization of debt owed to developed countries away from the past experience of a primarily commercial framework towards a developmental approach;

2. *Affirms* the urgency of reaching a general and effective solution to the debt problems of developing countries;

3. *Agrees* that future debt negotiations should be considered within the context of internationally agreed development targets, national development objectives and international financial co-operation, ...;

4. *Stresses* that all these measures should be considered and implemented in a manner not prejudicial to the credit-worthiness of any developing country;

5. *Urges* the International Conference on Economic Co-operation to reach an early agreement on the question of immediate and generalized debt relief of the official debts of the developing countries, in particular of the most seriously affected, least developed, land-locked and island developing countries, and on the reorganization of the entire system of debt renegotiations to give it a developmental rather than a commercial orientation;

...

352. At the Conference on International Economic Co-operation (sometimes known as the "North-South Conference"), the developing countries from the outset placed the debt problem at the head of their list of priorities. They requested an *immediate* and *global* reorganization of the public debt of the least developed of the developing countries and those most seriously affected by the international economic crisis. They also proposed an objective method for the re-examination of the debt for those among them that might be affected in the future.

The industrialized countries, for their part, refuse for the time being to consider any immediate and global reorganization and insist, even for the category of the least developed countries, on a *case-by-case* study. As regards the second part of the problem (future cases of reorganization), their counterproposals permit some relaxation of the current methods of examining debts and extend the new system to all the developing countries concerned.

A compromise proposal by Sweden relates in particular to the immediate global reorganization of the debt of the east developed countries, to which it agrees in principle.

353. In short, then, an immediate and global reorganization of debts is the current stumbling-block in the negotiations. It would seem, in fact, that the developed countries would at most be prepared to agree to *the cancellation of the public debt of the least developed countries* (namely, 28 countries classified as such by the United Nations). But the countries most heavily burdened by debt (India, Pakistan, Indonesia, Brazil) would be excluded from that category and there would thus be no comprehensive solution to the grave and agonizing problem of the debt burden of developing countries.

G. Some elements of a solution

354. Although decolonization was not involved, but rather a new colonization through a change in administering Power, it is useful to consider the manner in which the debts of the German colonies were dealt with in 1919. Article 257, paragraph 7, of the Treaty of Versailles [271] provided that:

In the case of the former German territories, including colonies, protectorates or dependencies, administered by a Mandatory under Article 22 of Part I of the present Treaty, *neither the territory nor the Mandatory Power shall be charged with any portion of the debt of the German Empire or States.* *

This solution was subsequently confirmed by article III, paragraph B, of the Hague Convention of 20 January 1930. [272]

355. It is interesting to note the arguments with which the Allies justified the solution provided for in the Treaty of Versailles. [273] Those arguments were based, *inter alia*, on:

1. The fact that the budget of the German colonies had often shown deficits and that those colonies were therefore unable to assume part of the German debt;

2. The consideration that *the indigenous inhabitants had derived no benefit from German investments, Germany's expenditure having generally been of a military and unproductive nature and having been made in the exclusive interest of the metropolitan country*;

3. The consideration that it would have been unjust to make the Mandatory Powers assume responsibility for those debts since they had been appointed trustees on behalf of the League of Nations and thus would derive no profit from the situation. [274]

356. It is ironic to observe that at least the first two arguments put forward by the Allies at the time could quite well be turned against them today by the newly independent States. Nothing has happened since to reduce their force. The first argument, relating to the deficit in the budget of the colonies and their impecuniosity, has today taken on dramatic relief, as was noted

[271] For reference, see para. 95 above.

[272] Agreement regarding the complete and final settlement of the question of reparations (League of Nations, *Treaty Series*, vol. CIV, p. 243).

[273] See "Reply of the Allied and Associated Powers", *British and Foreign State Papers, 1919* (London, H.M. Stationery Office, 1922), vol. CXII, parts IV and IX.

[274] Feilchenfeld, *op. cit.*, pp. 441-443 and 548-566.

above.[275] As for the second, it has never lost its validity. Admittedly, it related to the lack of benefit derived by the colony from investments by the metropolitan country, in other words, a type of "colonial debt" (a debt owing to the metropolitan country) that is excluded from this study, but it would have had the same value and the same relevance had it related to debts contracted by Germany on behalf of its colony, or contracted locally by German organs of the colony.

The two arguments may be used as elements in the search for a solution.

1. NON-TRANSFERABILITY TO THE NEWLY INDEPENDENT STATE OF DEBTS RELATING TO LOANS THAT DID NOT BENEFIT THE DEPENDENT TERRITORY (CRITERION OF UTILITY)

357. This presupposes that the administering Power contracted a loan (*a*) that was intended for the dependent territory, (*b*) that was actually allocated to that territory, and (*c*) that benefited the territory. Thus, loans of the type considered above,[276] which gave rise to a national debt improperly assigned by Spain to its South American colonies, are excluded.

358. Although he was writing about a period that is long since past, Bustamante y Sirvén, referring to the criterion of utility, summarized the problem perfectly:

> The situation is different when colonies, dependencies or autonomous legal persons that have become independent States are involved. There is no reason in such cases why they should accept, or have imposed upon them, a portion of the metropolitan debts. Those debts were not a direct burden on their budget while they formed part of the former State and should not begin to be a burden on it at the very time when they are separated from that State. But if the debts on which a decision is to be taken belong excusively to the budget of the region that has become independent, *a distinction must be made according to the manner in which they were contracted or issued.* * If they were the result of the initiative or the endeavour of the metropolitan country, and if they were created without the consent or intervention of the former colony or dependency, nothing in the general terms warrants their acceptance by the latter, unless they have been used in its territory and for its industrial or commercial—not military—profit or benefit. When such consent and intervention exist, as a result of the exclusive and legitimate will of the colonies or dependencies, without which it would not have been possible to issue or contract the debt, the debt must be assigned wholly to them.[277]

359. The same writer refers also to the case where a debt benefited both the "colony" and the "metropolitan country" and asks that the portion of the debt chargeable to one or the other should be fixed in proportion to the profit each derived from it:

> There may also be debts that in their origin and application are common to the former metropolitan country and to the newly independent territory, a situation in which it is important also to take into account the purpose of the debt and the circumstances that gave rise to it when deciding, in connexion with its payment, what is correct according to the rules set out earlier.[278]

360. It will also be recalled that the representative of Mali, speaking at the second session of UNCTAD, stated in connexion with the application of the criterion of utility that "many countries could legitimately have contested the legal validity of debts contracted under the auspices of foreign Powers ... during the colonial period".[279]

361. However, the Special Rapporteur does not deny that the criterion of utility, which is fundamentally just, is sometimes difficult to apply in practice. During a regional symposium held by UNITAR at Accra in 1971, the question was raised in the following terms:

> To justify the transfer of debts to a newly independent State, it was argued ... that, since in a majority of cases the metropolitan Power made separate fiscal arrangements for the colony, it would be possible to determine the nature and extent of such debts. One speaker argued that any debt contracted on behalf of a given colony was not necessarily used for the benefit of that colony. He suggested that perhaps the determining factor should be whether the particular debt was used for the benefit of the colony. Althouth this point was generally acceptable to several delegates, doubt was raised as regards how the utility theory would in practice be applied, i.e., who was to determine and in what manner the amount of the debt which had actually been used on behalf of the colony.[280]

362. But this reasoning can be carried still further. Even in the case of loans granted to the administering Power for the development of the dependent territory (criterion of intended use and allocation), the *colonial context* in which the development of the territory may take place thanks to these loans disqualifies the undertaking. It is by no means certain that the investment in question did not primarily benefit a foreign colonial settlement or the metropolitan economy of the administering Power. In these circumstances, it would be unjust to make the newly independent State assume the corresponding debt even if that State retained some "trace" of the investment, in the form, for example, of public works infrastructures. Such infrastructures might be obsolete or unusable in the context of decolonization, with the new orientation of the economy or the new planning priorities decided upon by the newly independent State.

363. Indeed, there is no perceptible difference in kind or even in degree between the loans that enabled Germany to establish its settlers in Posen, and that were rightly rejected by Poland after the First World War,[281] and those that an administering Power may have contracted for the same purpose of settlement, of development for the benefit of its settler nationals, and of perpetuation of colonization in a dependent territory.

364. A rule could thus be formulated to reflect this idea. Its purpose would be to affirm, as a matter of principle and by reason of the colonial context, the non-transferability of the debts in question unless it is

[275] See paras. 336-353 above.

[276] See para. 290.

[277] Sánchez de Bustamante y Sirvén, *op. cit.*, pp. 296 and 297.

[278] *Ibid.*, p. 297.

[279] See para. 348 above.

[280] Report of the United Nations Regional Symposium on International Law for Africa, held at Accra, Ghana, from 14 to 28 January 1971, organized by UNITAR at the invitation of the Ghanaian Government, p. 9.

[281] See para. 168 above.

proved that they actually benefited the newly independent State. This rule could be formulated as follows:

Article F. Non-transferability of debts contracted by the administering Power on behalf and for the account of the dependent territory

Save as otherwise agreed or decided, the newly independent State shall not assume debts contracted on its behalf and for its account by the predecessor State, unless it is established that the corresponding expenditures actually benefited the formerly dependent territory.

365. The rule provisionally proposed by the Special Rapporteur places the burden of proof on the predecessor State rather than on the newly independent State. It enunciates a general principle of non-transferability of the debts of the administering Power, to which exceptions may be allowed if the latter, in its claim, furnishes proof that the debt it contracted actually benefited the dependent territory. This is justified by the colonialism imposed on the territory, which by nature and fundamentally is an "act of exploitation" justifying newly independent States not only in repudiating all the debts of the predecessor State but even in claiming compensation from the administering Power for such exploitation. The Conference of Heads of State or Government of Non-Aligned Countries, held in September 1961 in Belgrade, took such a position, subsequently confirmed by other "summit conferences" of non-aligned countries.

366. Perhaps it will be argued that the rule proposed by the Special Rapporteur goes beyond the legal theory usually invoked in this matter. By and large, this theory makes the successor State liable for "localized" State debts, and that is what is under discussion here. But, as will be seen, the Special Rapporteur will propose that this theory should be made a rule for all types of State succession except in the specific case of decolonization, because of the context of colonial exploitation. In so doing, the Special Rapporteur is simply applying one of the elements of this theory, which itself provides for exceptions to the transfer of debts of the predecessor State localized in the transferred territory when such debts are "contrary to the interests of the territory". It is the colonial climate, the context of domination and the fact of exploitation that make these debts "odious", because they are "contrary to the interests of the territory".

2. Maintenance of the guarantee given by the predecessor State in respect of loans contracted by the then dependent territory

367. This problem involves three protagonists, in specific and distinct roles: the dependent territory, which contracted the loan, the administering Power, which guaranteed it, and the third State, which granted it.

(a) *The dependent territory*

368. The Special Rapporteur will take a case where the representatives of the administering Power in the dependent territory, acting as organs of the latter in the context of its financial autonomy, have obtained loans from third States (or from their nationals) intended for that territory. In accordance with the typology of debts outlined by the Special Rapporteur, [282] these debts do not concern the present study, which is devoted to the examination of the treatment of State debts of the *predecessor State*. The Special Rapporteur described them as "debts proper to" the dependent territory. Provided that they have been justified by their usefulness to the dependent territory, it would seem that the latter should remain liable for them when it becomes an independent State. In any case, they need not be considered in this study, which is confined to State debts. They would concern this report only if another element were involved, i.e. that constituted by *the guarantee given by the predecessor State* when it was the administering Power of the dependent territory.

(b) *The administering Power*

369. The guarantee given by the predecessor State was clearly a decisive element in the conclusion of the loan contract. The creditor did not place its trust in the dependent territory, otherwise it would have required no more than the latter's undertaking. At the very least, it did not place its trust in the territory *alone*. It was the intervention of the administering Power, in the form of a guarantee, that was presumably the determining factor for the creditor, or at least a far from negligible factor.

370. The guarantee thus furnished by the administering Power legally creates a specific obligation for which it is liable, and a correlative subjective right of the creditor. If succession of States had the effect of extinguishing the guarantee altogether and thus of relieving the predecessor State of one of its obligations, that would unjustifiably extinguish a right of the creditor third State. The problem that has to be resolved here by the study of State succession is not, therefore, what becomes of the debt proper to the dependent territory, but rather what becomes of the element whereby the debt is supported, furnished in the form of a guarantee by the administering Power. The issue, then, is not succession to the debt proper to the dependent territory but succession to the *obligation of the predecessor State* in respect of the territory's debt.

371. The guarantee may be more or less extensive or have more or less force. It may take the form of a *mere surety*. It may also make the administering Power the genuinely *principal debtor*. Daniel Bardonnet cites the case of loans issued by the "governments-general" of Madagascar that could be contracted only because the Government of metropolitan France guaranteed them in full. [283] The Special Rapporteur has in particular cited the case of loans granted by IBRD to a dependent territory with a *very extensive guarantee* by the administering Power. [284] The guarantee agreements negotiated by IBRD, provided that the administering Power had an obligation in respect of the debt in question "as primary obligor and not as surety merely". [285]

The obligation of the predecessor State in this case gives the third State *a right to continue to demand payment of the whole of its debt-claim.*

[282] See paras. 261 *et seq.* above.

[283] Bardonnet, *op. cit.*, pp. 645-659.

[284] See paras. 316 and 317 above.

[285] See para. 274 above.

(c) *The creditor third State*

372. When the guarantee is given by the predecessor State in these circumstances, it unquestionably gives the creditor third State a right *to demand payment of the whole of its debt-claim solely from the predecessor State, if it prefers*, exactly as though the latter, and not the dependent territory, were the sole debtor. It is difficult to see why or how succession of States could destroy this right.

373. The practice followed by IBRD in this regard is clear. It is true that IBRD turns first to the newly independent State, for it considers that the loan agreements signed by the dependent territory are not affected by a succession of States as long as the debtor remains identifiable. For the purposes of these loan agreements, IBRD would appear to take the view that succession of States had not changed the identity of the entity existing before independance. But it considers—and the predecessor State that has guaranteed the loan in no way denies—that the legal effects of the contract of guarantee continue to operate after the territory has become independent, so that IBRD can at any time claim against the predecessor State if the successor State defaults.

The practice of IBRD shows that the predecessor State cannot be relieved of its guarantee obligation as the principal debtor unless a new contract is concluded to this effect between IBRD, the successor State and the predecessor State, or between the first two, aimed at relieving the predecessor State of all the charges and obligations it had assumed by virtue of the guarantee it had given earlier.

374. In consequence of the foregoing, a rule might perhaps be formulated along the following lines:

Article G. Maintenance of the guarantee given by the predecessor State to cover loans contracted by the dependent territory

In the case of a newly independent State, succession of States does not affect as such the guarantee given by the predecessor State for a debt contracted for the account of the dependent territory.

3. CONSIDERATION OF THE SELF-DETERMINATION AND FINANCIAL CAPACITY OF THE NEWLY INDEPENDENT STATE IN RESPECT OF SUCCESSION TO STATE DEBTS

375. The Special Rapporteur has drawn attention to the financial burden borne by most of the newly independent States.[286] Not all their debts were contracted after independence; some were contracted by the administering Power on behalf of the dependent territory (or by representatives of the "metropolitan country" as organs of the dependent territory). Succession to such debts places on some States obligations that are so extensive and onerous that it is almost impossible for them to see how they can meet them. Hence *the question arises as to the extent to which any principles of international law that might be formulated in respect of succession to debts would not be reversed by other principles of law or other considerations.*

376. (A) Before considering this situation, however, it would be useful to refer briefly to an age-old problem that by no means arises only in connexion with the emergence of new States, namely, the incapacity of States to pay their debts. In 1935, in his famous course at the Academy of International Law on "default by States", Professor Gaston Jèze stated:

> With the exception of a few small States (Switzerland, Holland), all the others have failed more or less seriously to meet their obligations ...
>
> The example of default by debtors comes from higher up ...
> ...
>
> The most powerful States, which prided themselves on having always met their obligations, have defaulted: *England, Germany, Belgium, France*, the *United States*, and so on. Following in their footsteps, most States have done the same.[287]

Analysing the bankruptcy declared in France in Year VI, the author stresses as a novelty of the time the categorical affirmation of *the right* of a State to declare bankruptcy: on 8 Vendémiaire of Year VI, Crétet stated in his report to the Council of Elders (Conseil des anciens):

> Is a State justified, in law, in reducing its debt in strict proportion to the amount it can pay? ... The State, no more than the individual, is not bound to do the impossible.[288]

377. Until the formulation at the end of the nineteenth century of the Drago doctrine, which prohibited the use of foce to recover debts, creditor States did not hesitate to send demands and even gunboats to support the claims of their nationals.

378. In his study, Jèze draws the conclusion that a principle has emerged to the effect that

> a government is justified in suspending or reducing the service of its public debt whenever essential public services would have to be jeopardized or neglected in order to service the debt. In other words, the public debt is not the first public service to be met.[289]

Moreover, "only the government of the debtor country is competent to say whether essential public services would be jeopardized by servicing the debt".[290] Jèze concludes that "these principles are indisputable and undisputed".[291]

379. (B) *State practice in the matter of succession to debts shows that the financial capacity of States to which such debts are assigned has traditionally been taken into account.* That was historically so in particular with regard to the apportionment of the Ottoman public debt, but also with regard to the debts of other countries settled by the Treaties of Versailles and Saint-Germain-en-Laye in 1919.[292] In so far as the settlement of the debt failed to take into account the financial capacity of the successor State, the latter, faced with what it felt was an injustice, invoked voluntarist arguments: Yugoslavia thus refused to assume a portion of the Turkish debt, invoking the fact that it had not signed the Treaty of Lausanne of 1923. Albania, Yemen and the Hejaz did likewise.

[286] See paras. 336-353 above.

[287] Jèze, "Les défaillances d'Etats", *loc. cit.*, pp. 381 and 386.

[288] *Ibid.*, p. 388.

[289] *Ibid.*, p. 391.

[290] *Ibid.*

[291] *Ibid.*, p. 392.

[292] See Rousseau, *op. cit.*, pp. 442-447.

380. (C) Admittedly, the idea of taking into account the "financial capacity" of a State is vague and may open the way to abuses. On the other hand, it is neither possible nor realistic to ignore the reasonable limits beyond which the assumption of debts would be destructive for the debtor and without result even for the creditor.

381. When claiming from debtor States repayment of certain loans that it had granted them, the United States Government was to set a good example by rightly stating, in reply to a British note of 1 December 1932, that the principle of capacity to pay did not require that the foreign debtor should pay to the full limit of its current or future capacity. It was essential, the reply continued, to permit the foreign debtor to safeguard and improve its economic situation, to balance its budget and to establish its finances and currency on a sound basis, as well as to maintain and, if possible, to improve the living standard of its citizens; *no settlement that was oppressive and that delayed the recovery and progress of the foreign debtor was in accordance with the true interest of the creditor.* [293]

382. Such ideas were given legal expression in the arbitral award of 11 November 1912 between Turkey and Russia concerning the Ottoman debt. The award states, *inter alia:*

> The exception of *force majeure* ... may be pleased ... in public as well as in private international law. *International law must adapt itself to political necessities.* * The Imperial Russian Government expressly admits ... that the obligation of a State to carry out treaties may give way "if the very existence of the State should be in danger, if the observance of the international duty is ... "self-destructive". *
>
> It is incontestable that the Sublime Porte proves, by means of the exception of *force majeure* ... that Turkey was, from 1881 to 1902, in the midst of financial difficulties of the utmost seriousness ... [294]

383. (D) Transposed to the context of succession to debts in the case of newly independent States, these considerations relating to the financial capacity of the debtor are of great importance. The Special Rapporteur is not unaware of the fact that cases of "State default" involve debts already recognized by and assigned to the debtor, whereas in the cases with which this study is concerned the debt has not yet been "assigned" to the successor State and the whole problem is, first, whether the newly independent State must be made legally responsible for such a debt, and then whether it can assume it financially. Nevertheless, the two questions must be linked if practical and just solutions are to be found to situations in which prevention is better than cure. What purpose is served by affirming in a rule that certain debts are transferable to a newly independent State if its economic and financial difficulties are known in advance? And no State can be better informed than the predecessor State, as the former administering Power, of the financial difficulties of the young State that it is setting free to join the international community.

384. Moreover, as the Special Rapporteur observed earlier, [295] in various types of State succession historical precedents have taken into account the financial capacity of the successor State. In the case of newly independent States, it may be permissible to go so far as to *assert the existence of an almost undeniable assumption of incapacity to pay*, merely on account of the eloquent "external sign" of the appallingly low *per capita* income published in the statistics of the United Nations and other international organizations.

385. In the case of succession to debts concerning newly independent States, this problem of financial capacity must also be considered in relation to the right to self-determination. Of course, if no limit were recognized to the sovereignty of the State, which could argue at its discretion that it was incapable of paying, there would be no point in formulating rules of international law. On the other hand, those rules should not run counter to the right to self-determination. The 1970 report of the International Law Association made a slight allusion to this in the following terms:

> *Reconstruction of their economies by several States* * have raised questions of the continuity of financial and economic arrangements made by the former colonial Powers or by their territorial administrations. [296]

The problem of succession to debts arises in the general terms of the reconstruction by newly independent States of their national economies.

386. Formerly, the problem had been approached from the opposite direction, so that the right to self-determination and independence was once more called in question for financial reasons:

> Now it appears that Libya is, at least from the economic viewpoint, unable to sustain herself. Is it the responsibility of the United Nations which created Libya to give it financial support ...? Who gained anything by this act of "self-determination"? [297]

387. Political independence is meaningless without economic independence. Many General Assembly resolutions have emphasized that permanent sovereignty over natural wealth and resources (which may have been pledged as security for debt!) is a fundamental element in the right of peoples to self-determination. Moreover, article 1, paragraph 2, of the International Covenant on Economic, Social and Cultural Rights as well as of the International Covenant on Civil and Political Rights [298] provides that:

> All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation... *In no case may a people be deprived of its own means of subsistence.* *

388. Consideration should therefore be given to drafting a provisional clause to specify that, in cases where a newly independent State might be bound by certain

[293] Cited by Jèze, "Les défaillances d'Etats", *loc. cit.*, p. 392.

[294] *The Hague Court Reports* (New York, Oxford University Press, 1916), pp. 317 and 318.

[295] Para. 379.

[296] International Law Association, *op. cit.*, p. 102.

[297] C. Eagleton, "Self-determination in the United Nations", *American Journal of International Law*, vol. 47, No. 1 (Washington D.C., January 1953), p. 89.

[298] Resolution 2200 A (XXI) of the General Assembly, annex.

State debts of the administering Power, it is important not to lose sight of its capacity to pay, which may be deficient, or of its concern to preserve the full meaning of its act of self-determination and its independence. The provision might, for example, be worded as follows:

Article H. Consideration of the self-determination and financial capacity of the newly independent State in connexion with succession to State debts

Nothing in the assumption of State debts by the newly independent State shall have the effect of seriously jeopardizing its economy or delaying its progress, of running counter to the right of its people to dispose of its own means of subsistence, or of limiting its right to self-determination and to the free disposal of its natural wealth.

Such a provision would be equally valid for debts proper to the dependent territory, which are not the subject of this study.

389. In the final analysis, the above wording might appear to exonerate, or be interpreted as exonerating, the newly independent State from any succession to debts. Even were that so, it would be in no way excessive, in the opinion of the Special Rapporteur, in view of the former exploitation and the current distressed state of the economies of the newly independent States. And when it is noted that for 20 years the great French economist, François Perroux, has been urging the world to build an international economy based essentially on grants, and that increasing consideration is being given at international meetings to the possibility of cancelling debts contracted in a sovereign manner by third world States *after* their independence, it might by the same token appear ridiculous to continue to impose on such States responsibility for debts contracted *prior* to their independence.

390. In adopting articles of the kind proposed above, the Commission would not be settling all problems relating to succession in respect of debts for newly independent States. In fact, *the bulk of the liabilities involved in succession does not, in the case of decolonization, consist of State debts of the predecessor State*, these being the only ones with which this study is concerned. They are debts said to be "proper to the dependent territory", contracted under a very formal financial autonomy by the organs of colonization in the territory, which constitute a considerable volume of liabilities. As has been seen, disputes have frequently arisen concerning the real nature of debts of this kind, which were at that time considered by the newly independent State as "State debts" of the predecessor State that must remain the responsibility of the latter. This leads, in a way, to the problem of debts contracted without benefit to the territory or even against its interests. It is for that reason that the Special Rapporteur attaches some value to the draft articles relating to the non-transferability of odious debts (war debts, subjugation debts and régime debts), without which there would be an obvious gap in the provisions.

In the case of decolonization, there remains the heavy burden of debts that the Special Rapporteur has also been obliged to exclude from his study and that represent amounts charged to the newly independent State by the predecessor State as the price of taking over all the public services of the territory, together with their liabilities.

H. Recapitulation of the text of the draft articles proposed in this chapter

Article F. Non-transferability of debts contracted by the administering Power on behalf and for the account of the dependent territory

Save as otherwise agreed or decided, the newly independent State shall not assume debts contracted on its behalf and for its account by the predecessor State, unless it is established that the corresponding expenditures actually benefited the formerly dependent territory.

Article G. Maintenance of the guarantee given by the predecessor State to cover loans contracted by the dependent territory

In the case of a newly independent State, the succession of States does not affect as such the guarantee given by the predecessor State for a debt contracted for the account of the dependent territory.

Article H. Consideration of the self-determination and financial capacity of the newly independent State in connexion with succession to State debts

Nothing in the assumption of State debts by the newly independent State shall have the effect of seriously jeopardizing its economy or delaying its progress, of running counter to the right of its people to dispose of its own means of subsistence, or of limiting its right to self-determination and to the free disposal of its natural wealth.

CHAPTER VI

Treatment of state debts in cases of uniting of States

A. Definitions

391. For the purposes of the present study, it is appropriate to recall the definition of uniting of States which, according to article 26 of the 1972 draft on succession of States in respect of treaties, [299] means "the uniting of two or more States in one State". A similar wording appears in article 30 of the 1974 draft [300] and in article 14 of the draft on succession of States in respect of matters other than treaties, [301] namely, "when two or more States unite and thus form a successor State". The commentaries on the aforementioned articles explain that they deal with the "uniting in one State of two or more States, which had separate international personalities at the date of the succession".

392. The constitutional form assumed by the successor State thus created is of considerable importance where

[299] See *Yearbook... 1972*, vol. II, p. 286, document A/8710/Rev.1 chap. II, sect. C.

[300] See *Yearbook... 1974*, vol. II (Part One), p. 252, document A/9610/Rev.1, chap. II, sect. D.

[301] See *Yearbook... 1976*, vol. II (Part Two), p. 147, document A/31/10, chap. IV, sect. B.

succession to public debts in general and to State debts in particular is concerned, as it is in the case of succession to property. The observations made by the Special Rapporteur on this point in his eighth report entirely hold good in respect of succession to State debts also. 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 of both international law and internal public law. All powers inevitably pass to the successor State, and the latter should obviously take over all the debts of the constituent States. If, on the other hand, the uniting of States leads to the creation of a confederation or 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, 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 debts, not all of which can be attributed to the uniting successor State. [302]

393. Moreover, as the Special Rapporteur explained in his eighth report, 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. The fact remains that, in many cases, succession to debts may occur in the same way through the acceptance of such debts by the successor State. Thus, one author agrees that "a State that annexes another and thereby comes into possession of the entire public and private patrimony of another State is, without the slightest doubt, obliged ... to acknowledge and honour its debts". He adds that "it has been the rule that States annexing other States assumed responsibility for their debts". [303] It is true that he was writing at a time when the evolution of international law was still in a relatively permissive phase as far as the annexation of territory was concerned. In the same vein, Fauchille wrote:

> Does a State cease to exist as a result of total incorporation in another State? The State that benefits from the incorporation must assume the resulting responsibilities. The payment of the debts of the incorporated State devolves upon it absolutely ... That is true not only of public debts proper, such as those resulting from public loans, but also, beyond that context, of debts incurred to private persons under contracts concluded before the incorporation. [304]

394. In any event, as the Special Rapporteur has already stated, the fact remains that annexation differs from the creation of a unitary State by the uniting of States because it is illegal; the two cases are also dissimilar in that *annexation does not lead to the creation of a* new *State, whereas the uniting of States inevitably does.* [305]

The present study will therefore deal mainly with the uniting of States under contemporary international law, whether such a merger results in a confederation of States, a federation or a unitary State. Cases of annexation will consequently be referred to only for the sake of historical comparison. Nevertheless, it remains understood that the general working hypothesis also covers the case where one State merges with another State even if the international personality of the latter subsists after they have united. [306]

395. Furthermore, as has already been stated, it is quite clear that the constitutional form of the successor State plays a fundamental role in this matter. It is this that indicates the degree to which the predecessor States have merged and determines the treatment of their debts under international conventions or norms of internal law such as a constitution or fundamental law. A study of such instruments is clearly necessary in order to gain a picture of international practice.

B. Treatment of State debts in early cases of uniting of States

396. It is quite exceptional for international conventions or constitutions dealing with problems of State succession, particularly with regard to property, not to deal at the same time with the treatment of debts. As a rule such problems are either dealt with or disregarded altogether, and the same examples may be cited, whether from the past or the present. As regards the past, the most notable examples of uniting of States are those of the United States, the Swiss Confederation, the unification of Germany and the unification of Italy. It would also appear worth while considering the union between Austria and Hungary of 1867, that between Sweden and Norway of 1814 and that between Denmark and Iceland of 1918. Reference may further be made to the cases of the Republic of Central America (Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua) of 1897 and the Federation of Central America (Costa Rica, El Salvador, Guatemala, Honduras) of 1921 (also known as the Central American Union).

1. Formation of the United States of America

397. This formation resulted, of course, from the evolution of the confederacy of 1777 into the federation of 1787. The different instruments drawn up on those occasions had to deal with problems relating to debts. It is worth while considering them in detail.

(a) *Articles of Confederation and Perpetual Union of 1777*

398. Two articles are concerned with debts. They read as follows:

> *Article VIII.* All charges of war, and all other expenses that shall be incurred for the common defence or general welfare, and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several States, in proportion to the value of all land within each State, granted to or surveyed for any person, as such land and the buildings

[302] See *Yearbook... 1976*, vol. II (Part One), p. 97, document A/CN.4/292, chap. III, art. 16, para. 4 of commentary.

[303] de Louter, *op. cit.*, pp. 228 and 229.

[304] Fauchille, *op. cit.*, p. 378.

[305] *Yearbook... 1976*, vol. II (Part One), p. 97, document A/CN.4/292, chap. III, art. 16, para. 6 of the commentary.

[306] See *Yearbook... 1976*, vol. II (Part Two), p. 147, document A/31/10, chap. IV, sect. B, art. 14, para. 1 of the commentary.

and improvements thereon shall be estimated according to such mode as the United States in Congress assembled, shall from time to time direct and appoint.

The taxes for paying that proportion shall be laid and levied by the authority and direction of the legislatures of the several States within the time agreed upon by the United States in Congress assembled.

Article XII. All bills of credit emitted, monies borrowed and debts contracted by, or under the authority of Congress, before the assembling of the United States, in pursuance of the present confederation, shall be deemed and considered as a charge against the United States, for payment and satisfaction whereof the said United States, and the public faith are hereby solemnly pledged.

399. These two articles should be read in conjunction with article II, which provides that:

Each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled. [307]

This article makes clear the degree of integration of the legal order decided upon by the States that signed the Articles of Confederation. This legal order remained in fact very weak, so much so that it was even questioned whether confederations of States possessed an international personality. [308] In any case, it must be agreed with Fauchille that:

*a confederation of States is a composite of States rather than a composite State.** Each of the confederate States retains its autonomy, its independence, the enjoyment of its sovereignty, both external and internal, except for minor restrictions inherent in the very idea of association. [309]

Each State member of the confederation reserves within its territory its full competence in fiscal matters and is responsible generally for the mobilization of its financial resources. Consequently, it must assume responsibility for its own debts.

400. Articles VIII and XII of the Articles of Confederation in no way called this principle into question. They made provision for a minimum of joint financial management of the confederation in the form of a "proportion" of expenses for which "taxes ... shall be laid and levied by the authority and direction of the legislatures of the several States within the time agreed upon by the United States in Congress assembled", as stipulated in article VIII. However, this method gave rise to a number of practical difficulties and, as one writer put it:

immediately after the war the obvious impotence of the confederacy was revealed. Serious political, financial and administrative difficulties arose; there was no money left in the treasury to pay the army and the government officials; nothing worked, and it quickly became apparent that the Articles of Confederation had to be amended. [310]

However, 10 years were to elapse before a real merger of the 13 States took place.

[307] For the text of the articles, see A. H. Kelly and W. A. Harbison, *The American Constitution—its Origins and Development* 3rd ed. (New York, Norton, 1963), appendix 1, pp. 987 *et seq*

[308] On this point, see Fauchille, *op. cit.*, pp. 241 *et seq.*, who analyses the relevant legal opinions.

[309] *Ibid.*, p. 242.

[310] L. le Fur, *Précis de droit international public*, 2nd ed. (Paris, Dalloz, 1933), p. 79.

(b) *Constitution of the United States, 1787*

401. Article VI, clause 1, of the Constitution adopted in 1787 provides as follows:

All debts contracted and engagements entered into before the adoption of this Constitution shall be as valid against the United States under this Constitution as under the Confederation. [311]

There would thus appear to be no doubt whatsoever as to the treatment of debts: these were to be taken over by the United States. A writer commenting on the United States Constitution, after pointing out that "the constituent States had no interest in having these obligations cancelled, since the nation's total debt scarcely exceeded $15 million", explains that, "whatever the government, the debts of the States and of the people of the United States had to be paid in full to national and international creditors". [312]

402. However, the position was not quite so simple. Unquestionably, the Federation of 1787 had as such the power to impose taxes, in accordance with article I, section VIII, clause 1, of the Constitution:

The Congress shall have power

To lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States ... [313]

Nevertheless, the Constitution still allowed a measure of autonomy to the federated States in fiscal matters, since article I, section X, clause 1, provides that: "No State shall ... pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, ...". [314] The practice of federalism would appear to tend towards the sharing of debts, with each party—the federated State and the federal State—being responsible for its own debts in its own sphere. Thus Fauchille asserts that,

as the State, from the internal point of view, has retained its own individuality, at least in principle, and can thus continue to be a debtor, it is the State itself and not the federal power ... that has ultimate responsibility for its own debts. [315]

Feilchenfeld, for his part, considers that "both the States and the Union assumed the debts which had been contracted by their predecessors, the colonies, the independent States, and the Confederacy". He explains further that

this assumption took place not because of succession but because of legal identity. While it is clear that the assumption was regarded as a matter of course, it is not stated expressly in the constitutional documents that it was considered as an obligation under international law. [316]

2. The Swiss Confederation [317]

403. Since 1291, the date of an early text concerning the league of three cantons—Uri, Schwyz and Unter-

[311] *Constitution of the United States* (United States Government Printing Office, Washington, D.C., 1973).

[312] M. L. Amaimo, *La Constitution des Etats-Unis* (Paris, Rivière, 1947), p. 132.

[313] *Constitution of the United States* (*op. cit.*).

[314] *Ibid.*

[315] Fauchille, *op. cit.*, p. 389.

[316] Feilchenfeld, *op. cit.*, pp. 58 and 59.

[317] On the Swiss public debt, see *ibid.*, pp. 167 *et seq.*

wald—a number of instruments have been elaborated defining the status of the Swiss Confederation. The Treaty of Alliance of 16 August 1814 and the two Constitutions of 1848 and 1874 deserve particular attention.

(a) *Treaty of Alliance of 16 August 1814*

404. Article III, paragraph 3, of the Treaty of Alliance among the Cantons of the Confederation stated: "To defray the costs of the war, there shall also be established a federal war treasury ...". [318] Article XIII acknowledged and fixed the amount of the Swiss debt, stating that "the Swiss national debt, the amount of which was fixed on 1 November 1804 at 3,118,336 Swiss francs, is acknowledged". [319]

405. This debt was again referred to in article LXXXII of the Act of the Congress of Vienna of 1815, which settled the financial dispute between the cantons of Zurich and Berne. It also divided responsibility for the Swiss debt among the various members of the Confederation, taking care to exempt from the debt cantons that had acceded to the alliance after 1813, when the debt was already of long standing. This alliance resulted in a Confederation in which, by definition, cantonal powers maintained an essential place, the implication being that States may assume responsibility only for debts arising from their own actions.

This article reads:

Article LXXXII. To put an end to the discussions which have arisen with respect to the funds invested in England by the cantons of Zurich and Berne, it is determined:

1. That the cantons of Berne and Zurich shall retain ownership of the capital fund, as it existed in 1803 at the time of the dissolution of the Helvetic Government, and shall receive the interest thereof from 1 January 1815.

2. That the accumulated interest due since 1798 up to and including the year 1814 shall be applied to the payment of the remaining capital of the national debt, known under the denomination of the Helvetic debt.

3. That the surplus of the Helvetic debt shall remain the liability of the other cantons, those of Berne and Zurich being exonerated by the above provisions. The quota of each of the cantons remaining liable for this surplus shall be calculated and paid according to the proportion set for the contributions for defrayal of federal expenses; the countries incorporated with Switzerland since 1813 shall not be assessed on account of the former Helvetic debt. [320]

(b) *The Helvetic Constitutions of 12 September 1848 and 31 March 1874*

406. In a historical note on Switzerland, it is observed that "grave internal dissensions and the Sonderbund religious war brought about the extinction of the 1815 covenant". [321] The confederal system left the cantons too much freedom, which could become dangerous. It was therefore necessary to achieve greater integration of these different entities. That was the purpose of the 1848 Constitution, which established a federal system. A first attempt at revision was made in 1872, but the text submitted to the cantons and the people for their approval was rejected because of the excessively unitary tendencies of the draft. It was not until 1874 that a second text was accepted. That is the present Constitution of Switzerland.

407. Neither the Constitution of 1848 nor that of 1874 contained any provisions that could be considered to refer to succession to debts. It may however be presumed that, since the federal system left the cantons a good deal of autonomy, including financial autonomy, they had to assume their own debts. Feilchenfeld seems to agree with this, both as regards Switzerland and the German Empire and, more generally, in connexion with the problem of succession to debts in the context of integration of States leading to a federation. He writes:

> When Switzerland was transformed into a federation in 1848, and when the German States united in the North German Confederation, and later in the German Empire, the component States remained charged with their own debts ... although some of their sources of revenue, such as customs revenues, naturally passed to the unions, the arguments has never been advanced that the unions thereby became responsible for portions of the debts of the component States. [322]

3. Succession to State debts in the course of the creation of German unity

408. It is generally agreed that the constitutional evolution of Germany from the extinction of the Germanic Holy Roman Empire may be summed up in a series of four confederal instruments through which Germany achieved its unity. 1. The *Confederation of the Rhine States*, created in Paris in 1806 by the signature of 13 German princes, but first and foremost by the will of Napoleon, ceased to exist with the end of the Empire in 1813. 2. The *Germanic Confederation* was the work of the Congress of Vienna, since it derived its charter from the Act on the federative constitution of Germany of 8 June 1815, supplemented by the Final Act of the Congress of Vienna, of 15 May 1820. The history of the Confederation, particularly after 1830, was simply that of the clash between Prussia and Austria over leadership. These struggles ended in 1866 with the defeat of Austria at Sadowa. 3. The *North German Confederation* came into being with the Peace of Prague, of 23 August 1866, which declared the dissolution of the Germanic Confederation. Prussia was thus able to establish under its leadership a confederation of the German States north of the Main, the Constitution of which was drawn up in 1867. 4. The *Constitution of the German Empire*, of 16 April 1871, completed the merger of the German States and thus brought about German unity.

Of these four instruments, the first two and the last will engage the particular attention of the Special Rapporteur.

[318] G. F. de Martens, ed., *Nouveau Recueil de traités* (Göttingen, Dieterich, 1887), vol. II (1814-1815) [reprint], p. 69.

[319] *Ibid.*, p. 74.

[320] *Ibid.*, p. 418.

[321] F.-R. Dareste and P. Dareste, *Les Constitutions modernes*, 3rd ed. (Paris, Challamel, 1910), vol. I, p. 534.

[322] Feilchenfeld, *op. cit.*, p. 286.

(a) *Treaty establishing the Confederation of the States of the Rhine (12 July 1806)* [323]

409. The very special nature of this association was clear. It was in fact a Napoleonic protectorate. Moreover, article XII provided that:

His Majesty the Emperor of the French shall be proclaimed Protector of the Confederation and in that capacity shall, upon the death of any Prince Primate, designate his successor.

With regard to the debts of the confederated States, article XXIX provided as follows:

The confederated States shall contribute to the payment of existing debts not only for their former possessions but also for the territories that were respectively subject to their sovereignty. The debt of the *Kreis* of Swabia shall be the responsibility of Their Majesties the Kings of Bavaria and Württemberg, Their Serene Highnesses the Grand Duke of Baden, ..., and shall be divided among them in proportion to the holdings of each of the said Kings and Princes in Swabia.

Article XXX provided for the treatment of proper debts, as follows:

Debts proper to each principality, county or domain coming under the sovereignty of one of the confederated States shall be divided between the said States and the reigning Princes or Counts in proportion to the revenues that the State in question is to acquire and the revenues that the Princes and Counts are to retain pursuant to the above provisions.

410. These two articles settled the question of succession to debts. In the first place, as regards the debts of the confederated States themselves, the States remained responsible for their debts. That was apparently a well-established principle in the Confederation, which left the member States their sovereignty, and hence responsibility for their financial commitments. These articles also covered the case of territories annexed or ceded to the confederated States. Succession to their liabilities occurred in proportion to the amount of territory received. This was a case of annexation and not of merger giving rise to a new State entity, and the spirit of the times thus required that *res transit cum suo onere*. That was apparently a well-established practice in the nineteenth century.

(b) *The Germanic Confederation*

411. Two instruments were adopted within the framework of the Congress of Vienna (1814) to establish the Germanic Confederation. They were the Act of 8 June 1815 and the Final Act of 15 May 1820, to "complete and consolidate the organization of the Germanic Confederation".

The *Act of 8 June 1815* [324] does not, properly speaking, contain any provision relating to succession to State debts. There is, however, an article 15 reading as follows:

The continuation of direct and subsidiary annuities payable out of the dues for navigation of the Rhine, and the provisions of the ordinance of the deputation of the Empire of 25 February 1803 concerning the payment of debts and pensions granted to individuals or laymen, shall be guaranteed by the Confederation ...

Article II of the Final Act of 15 May 1820 [325] shows that the member States had decided that the degree of integration and merger entailed by their Confederation should be relatively limited. It provides as follows:

As regards its internal relations, this Confederation forms a body of independent States linked by freely and mutually stipulated rights and duties. As regards its external relations, it constitutes a collective power founded on the principle of political unity.

412. The financial competence of the Confederal Diet is defined in article LII, as follows:

In order to achieve the purpose of the Confederation and to ensure the administration of its affairs, the States of which it is composed shall be assessed financial contributions. The Diet shall therefore be empowered: 1. to fix, in so far as is possible, the over-all amount of regular constitutional expenditures; 2. to establish the special expenditures required to carry out specific orders of the Diet issued for the purpose of achieving recognized purposes of the Confederation, and to determine the contributions required to cover such expenditures; 3. to fix the scale of assessments in accordance with which the various States are to contribute to common expenditures; to regulate and supervise the collection and use of financial contributions and the accounts relating thereto.

413. This provision, as might have been expected, by no means ensured that the Confederation would succeed to the debts of the member States. Its sole aim was to ensure the financing of a minimum of common expenditure, without which no association could possibly function. The confederated States remained responsible for their individual debts, whether incurred before or during the life of the Confederation.

(c) *Constitution of the German Empire (16 April 1871)* [326]

414. Federation or confederation? The legal status of the Empire is not easy to discern, and Fauchille asserts that "it was neither a unitary State nor a confederation of States nor a federal State. It was a new and quite special type." [327] The fact remains that, under the new Constitution, Germany made significant progress towards unity. That is shown by chapter XII of the Constitution, where provision is made in articles 69 to 73 for the organization of the finances of the Empire. [328] However, the purpose there was not to settle questions relating to the Empire's possible succession to the debts of the political entities that had preceded it, but to provide the Empire with the financial resources it needed in order to function.

415. Thus article 70 provided as follows:

Common expenditures shall be covered, in the first instance, by common revenue deriving from customs duties, common taxes, the railways, the postal and telegraph services and other branches of the administration. If this revenue is not sufficient to cover

[323] Treaty of Confederation of the States of the Rhine, signed at Paris on 12 July 1806 and ratified at Saint-Cloud on 19 July; see G. F. de Martens, ed., *Recueil des principaux traités* (Göttingen, Dieterich, 1835), vol. VIII, p. 480.

[324] C. A. Colliard and A. Manin, *Droit international et histoire diplomatique* (Paris, Domat-Monchrestien, 1970), vol. II (Europe), pp. 1 *et seq.*

[325] Final Act of the Ministerial Conferences held at Vienna to complete and consolidate the organization of the Germanic Confederation, signed at Vienna on 15 May 1820; see G. F. de Martens, ed., *op. cit.* (1824), vol. V, pp. 467 *et seq.*

[326] Text in Dareste and Dareste, *op. cit.*, pp. 172 *et seq.*

[327] Fauchille, *op. cit.*, p. 252.

[328] Dareste and Dareste, *op. cit.*, pp. 197-199.

expenditures, the deficit shall be made up, until such time as a new tax may be established, by means of a contribution assessed against each of the States of the Confederation in proportion to its population and fixed, in an amount not exceeding budgetary requirements, by the Chancellor of the Empire. If these contributions are not covered by surpluses from taxes transferred (*Überweisungen*), they shall be returned to the confederated States to the extent that the other ordinary revenue of the Empire is in excess of its needs. Surpluses from the previous year shall, unless otherwise provided by the Budget Act, be used to cover special common expenditures.

It was further provided, in article 73, that, "if special need should arise, a loan accompanied by a guarantee, for which the Empire shall be liable, may be ordered by Act of the Empire".

416. These provisions confirm the financial autonomy of the institutions of the Empire, but also imply that of the member States. Problems relating to succession to the debts of the predecessor States are thus not dealt with directly in the Constitution of the Empire. The limited extent to which the constituent States were merged within the unifying State appears to have precluded the latter's assuming their debts.

4. Creation of Italian unity and treatment of State debts [329]

417. As one writer put it, "Italy's affairs were for many years the most striking example we have of utter diplomatic confusion. The number of documents of every kind, treaties, conventions, protocols etc., which they spawned is beyond all statistical reckoning." [330] It is therefore out of the question to examine all these instruments; at most, a few of the more significant examples may be considered. Another problem is whether Italian unity came about through a process of unification by merger of States or by annexation of States. It should be recalled that where merger is involved a new State come into being, whereas in the case of annexation, which is now prohibited by international law, the previously existing subject of law survives. Scholarly opinion differs in describing the manner in which Italian unity was achieved, and Anzilotti summed up the various points of view as follows:

Some have regarded the Kingdom of Italy as an enlargement of the Kingdom of Sardinia, arguing that it was formed by means of successive annexations to the Kingdom of Sardinia; others have regarded it as a new subject of law created by the merger of all the former Italian States, including the Kingdom of Sardinia, which thus ceased to exist. [331]

Keeping in mind this ambiguous situation, the question of the treatment of debts in the course of the creation of Italian unity may now be examined.

418. In a general way, the Kingdom of Italy acknowledged in 1860 the debts of the formerly separate States. [332] That practice had already been instituted by the King of Sardinia. After the proclamation of the Kingdom of Italy under Victor Emmanuel II, the practice continued. Thus, the Treaty of Vienna of 3 October 1866, under which "His Majesty the Emperor of Austria agrees to the union of the Lombardo-Venetian Kingdom with the Kingdom of Italy" (article III), included an article VI that provided as follows:

The Italian Government shall assume responsibility for: 1. that part of Monte Lombardo Veneto that was retained by Austria under the agreement concluded at Milan in 1860 in application of article 7 of the Treaty of Zurich; [333] 2. the additional debts contracted by the Monte Lombardo Veneto between 4 June 1859 and the date of conclusion of this Treaty; 3. a sum of 35 million Austrian florins in cash, representing the portion of the 1854 loan attributable to Venezia in respect of the cost of non-transportable war materials. The mode of payment of this sum of 35 million Austrian florins in cash shall, in accordance with the earlier Treaty of Zurich, be specified in an additional article. [334]

419. Lastly, the Kingdom of Italy assumed the debts of the Papal States. The example may be cited of the Treaty of 15 September 1864 between France and Italy, under article 4 which:

Italy declares that it is prepared to conclude an agreement providing for its assumption of a proportionate part of the debt of the former Papal States. [335]

Unquestionably, in the case of the Italian union, the successor State had to assume the debts of the various States that were to make up the Kingdom of Italy. This was no doubt a reflection of the general sentiment of the time that *res transit cum suo onere*. It was also, above all, if not exclusively, a reflection of the fact that, in the case of Italy, the merger resulted in the creation of a unitary State.

5. Settlement of State debts in the Austro-Hungarian union

420. This is often cited as an example of a "real union". The description merits examination. The union of Austria and Hungary was based essentially on two instruments: 1. the Austrian "Act concerning matters of common interest to all the countries of the Austrian Monarchy and the manner of dealing with them" of 21 December 1867; 2. the "Hungarian Act [No. 12] relating to matters of common interest to the countries of the Hungarian Crown and the other countries subject to the sovereignty of His Majesty and the manner of dealing with them", of 12 June 1867. [336]

421. These two instruments contain provisions relating, in the first place, to common expenditures. A real union implies, even more than a personal union, the existence of "matters of common interest" involving

[329] See Feilchenfeld, *op. cit.*, pp. 209 *et seq.*

[330] P. Albin, *Les grands traités politiques. Recueil des principaux textes diplomatiques depuis 1815 jusqu'à nos jours, avec des commentaires et des notes* (Paris, Alcan, 1911), p. 62.

[331] D. Anzilotti, *Cours de droit international* (Paris, Sirey, 1929), p. 185 [French translation from the third Italian edition by G. Gidel].

[332] De Louter, *op. cit.*, p. 229.

[333] The Treaty of Zurich, of 10 November 1859, concluded between Austria and France, ceded Lombardy to France. Under article 7 of the Treaty, the "new government of Lombardy" was to assume three fifths of the Monte Lombardo Veneto debt (see G. F. de Martens, ed., *op. cit.* (1860), vol. XVI, Part II, p. 518).

[334] *Ibid.* (1873), vol. XVIII, pp. 405 and 406.

[335] *Ibid.*, p. 24.

[336] Dareste and Dareste, *op. cit.*, pp. 394 *et seq.* for the Austrian Act and pp. 403 *et seq.* for the Hungarian Act.

expenditures. In this connexion, article 3 of the Austrian Act of 21 December 1867 provides:

Expenditures relating to matters of common interest shall be borne by the two parts of the Monarchy in a proportion to be fixed, subject to the approval of the Emperor, by an agreement renewed at certain intervals between the representative bodies (*Reichsrat* and Diet) of each of them.

422. The same article specifies that "ways and means of paying the contribution for which each of the two parts of the Empire is responsible shall remain the exclusive concern of each of them". However, it provides for the eventuality of a joint loan in these terms:

Nevertheless, a joint loan may be contracted to defray expenditures relating to matters of common interest. In that event, all matters relating to the contracting of the loan, as well as the manner in which it is to be employed and repaid, shall be decided jointly. The decision whether there is need to resort to a joint loan shall, however, remain a matter for the legislature of each of the two halves of the Empire.

423. Hungarian Act No. 12 of 1867 provides, for its part, in article 18:

If an understanding is reached regarding such matters [matters recognized as being of common interest] by agreement between the two parts, the proportion in which the countries of the Hungarian Crown shall be responsible for the costs and expenditures relating to matters recognized as being of common interest under Pragmatic Sanction shall be determined in advance by mutual agreement.

The principle of such a contribution by the various member States of a union to the expenditures arising from their joint acitivities is quite generally accepted, and is to be clearly observed in all unions of States that allow the sovereignty of the member States to subsist.

424. The two aforementioned instruments of the Austro-Hungarian Union also settle the problem of debts. First, the Austrian Act provides, in article 4, that "the contribution to the costs of the pre-existing public debt shall be determined by agreement between the two halves of the Empire".

425. Hungary, on the other hand, showed itself more reluctant to assume State debts. It invoked its sovereignty to dispute the view that it had an obligation to assume them and, when it eventually decided to accept part of the debt, it did so for reasons of equity and on grounds of expediency. Articles 53 to 57 of the Act of 1867, in which Hungary defends its thesis, deserve to be quoted in full:

Article 53. As regards public debts, Hungary, by virtue of its constitutional status, cannot, in strict law, be obliged to assume debts contracted without the legally expressed consent of the country.

Article 54. However, the present Diet has already declared "that, if a genuine constitutional régime is really applied, as soon as possible, in our country, and also in His Majesty's other countries, it is prepared, for considerations of equity and on political grounds, to go beyond its legitimate obligations and to do whatever shall be compatible with the independence and the constitutional rights of the country to the end that His Majesty's other countries, and Hungary with them, may not be ruined by the weight of the expenses accumulated under the régime of absolute power and that the untoward consequences of the tragic period which has just elapsed may be averted".

Article 55. Because of this consideration, and for this reason alone, Hungary is prepared to assume a portion of the public debts and to conclude an agreement to that effect, after prior negotiations, with His Majesty's other countries, as a free people with a free people.

Article 56. In the future, public credit shall be a joint concern in all cases where Hungary and His Majesty's other countries deem it useful to their interests, in the light of the circumstances, to contract together and jointly some new loan. All matters relating to the terms of such a loan and to the utilization and repayment of the sums borrowed shall be decided jointly. However, the prior decision to contract a joint loan shall, in each specific case, in so far as Hungary is concerned, be a matter for the Hungarian Diet.

Article 57. Moreover, Hungary solemnly declares by this resolution that, in accordance with the genuine constitutional principle whereby the country cannot be held responsible for any debt without its consent, Hungary will not in future consider itself responsible for any public debt that shall have been contracted without the consent of the country, formally expressed in legal form.

6. Swedish-Norwegian union and treatment of State debts

(a) *Kiel Peace Treaty (14 January 1814)*

426. The history of the union between Sweden and Norway, which is generally regarded as the first major example of a real union, began with the "Treaty of Peace between Their Majesties the Kings of Sweden and Denmark, concluded at Kiel on 14 January 1814".[337] Article IV of the treaty states:

His Majesty the King of Denmark renounces all rights and claims to the Kingdom of Norway irrevocably and for ever, on behalf of himself and his successors, in favour of His Majesty the King of Sweden and his successors ... All rights and benefits shall henceforth be held in full and sovereign possession by His Majesty the King of Sweden, and shall form a kingdom united with the Kingdom of Sweden ...

427. It should be noted, however, that the abovementioned treaty was not the basis of the Swedish-Norwegian union, which was rather the result of the Act of Union (*Riksakt*) of 6 August 1815. Yet it is worthy of attention here because, according to Feilchenfeld, it was "the first great international treaty of cession which provided for a general distribution of debts, and not merely for the transfer of *dettes hypothéquées* and other locally connected debts".[338] Article VI of the Treaty dealt with the problem of the succession of Sweden to the part of the debt for which Norway was responsible. It read as follows:

Article VI. Since the whole of the debt of the Danish monarchy rests upon the Kingdom of Norway as well as on the other parts of the Kingdom, the King of Sweden, as sovereign of Norway, agrees to assume a part of the said debt proportionate to the population and revenues of Norway. The public debt is understood to include both debt contracted by the Danish Government abroad and that contracted by it within its States. The latter consists of royal and State bonds, bank-notes and other bills issued by royal authority and currently circulating in the two Kingdoms. The exact amount of this debt, as at 1 January 1814, shall be determined by commissioners appointed for the purpose by the two Governments

[337] Text in G. F. de Martens, ed., *op. cit.* (1817), vol. I, pp. 666 *et seq.*

[338] Feilchenfeld, *op. cit.*, p. 142.

and shall be apportioned according to an exact computation of the population and revenues of the Kingdoms of Denmark and Norway. The commissioners shall meet at Copenhagen within one month after the ratification of this treaty, and shall complete their task as soon as possible and at the latest within one year. It is understood that His Majesty the King of Sweden, as sovereign of the Kingdom of Norway, shall not for his part assume any debt contracted by the Kingdom of Denmark, other than the aforementioned, which all the States of that Kingdom prior to the cession of Norway were committed to repay.

The treaty applies the principle *res transit cum suo onere*. Indeed, this concept is one that was often to appear in the numerous treaties for the cession of territories concluded as part of the reorganization of Europe occurring after the collapse of the Napoleonic Empire.

428. Having received Norway, Sweden was to renounce, under article VII, "all rights and claims to the Duchy of Swedish Pomerania and the principality of the Island of Rügen, ... [which] shall henceforth be held in full possession by the Crown of Denmark and shall be incorporated in that Kingdom".

429. With regard to debts, article X stipulated that

The public debt contracted by the Royal Diet of Pomerania shall be the responsibility of His Majesty the King of Denmark, as sovereign of Swedish Pomerania, who shall assume the undertakings given in this connexion for the repayment of the said debt ...

It should be noted that the responsibilities to be assumed by the two States for the territories that they incorporated were not completely parallel. Denmark was obligated only for the debts of the Royal Diet of Pomerania, whereas Sweden had to assume all the part of the public debt attributed to Norway, "both debt contracted by the Danish Government abroad and that contracted by it within its States", as specified in article VI.

(b) *Act of Union (31 July and 6 August 1815) and Constitutions of Sweden and Norway*

430. Rather than in the Treaty of Kiel of 14 January 1814 discussed above, [339] the real basis of the Swedish-Norwegian union is to be found in the Act of Union, or *Riksakt*, of 6 August 1815, article 1 of which states that "the Kingdom of Norway shall be a free, independent, indivisible and inalienable kingdom, united with Sweden under one King". [340] The Act is devoted almost entirely to the rules for the transfer of the Crown and contains no express provision for succession of the Union to the liabilities of the constituent States, which therefore remained responsible for their own debts. This was confirmed by the Constitutions of the two Kingdoms.

431. For example, article 93 of the Norwegian Constitution of 4 November 1814 stated quite clearly that "Norway shall not be bound by any debt other than its national debt". [341] A similar conclusion may be drawn from the Swedish Constitution of 6 June 1908, which predates the Act of Union and was in no way amended following that event. [342]

432. As was noted by one author, "Norway and Sweden limited their common institutions and their common dealings to the minimum needed for a real union: a common monarch and a common diplomacy". [343] For the rest, each component State enjoyed complete freedom. In particular, the debts of neither State devolved upon the union. In that respect, the Swedish-Norwegian union did not differ from other unions of the same type.

7. Problem of State debts in the union between Denmark and Iceland

433. The nature of the union between Denmark and Iceland has been interpreted in contradictory ways. Fauchille, for example, viewed it as a personal union, [344] whereas de Louter regarded it rather as a real union, [345] as did Professor Rousseau, although he found that it presented "the strangest characteristics". [346] The Act establishing the Union provides:

Denmark and Iceland shall be two free and sovereign States, united by the fact that they have the same King and by the agreement contained in this Act of Alliance. The names of the two States shall be included in the title of the King. [347]

434. It would be very difficult to conclude from the other provisions of the "Act of Alliance" that the Union assumed responsibility for the debts of the two Kingdoms, especially since section III of article 11 states that, "with regard to *the contribution of Iceland to the expenses incurred in connexion with the cases mentioned in this section*, * matters that have not been regulated in the foregoing articles shall be dealt with in an agreement between the two countries". The cases in question, to cite only the most important, relate to common concerns such as international relations, inspection of fisheries in Icelandic waters, and so on, which Denmark agreed to handle on behalf of Iceland until such time as the latter decided to deal with them itself.

435. Even the loosest union necessarily involves common concerns for which the financial burden is shared among the various States of the union. The Union between Denmark and Iceland was no exception. Each State was to make its contribution to the common expenses but, for the rest, each was responsible for its own debts.

8. Uniting of States in Central America

436. Following the accession to independence of the Spanish colonies in America, the new States made

[339] Para. 426.

[340] G. F. de Martens, ed., *op. cit.* (1887), vol. II (1814-1815) [reprinted], p. 609.

[341] Dareste and Dareste, *op. cit.*, p. 142, foot-note 4.

[342] See articles 66 and 76 of the Constitution in Dareste and Dareste, *op. cit.*, p. 100.

[343] B. Morgenstierne, "Les unions suédo-norvégienne et d'Autriche-Hongrie", *Revue de droit public et de la science politique en France et à l'étranger* (Paris, July-Sept. 1905), vol. XXII, No. 3, p. 533.

[344] Fauchille, *op. cit.*, p. 231.

[345] De Louter, *op. cit.*, p. 199, foot-note 2.

[346] Rousseau, *op. cit.* (1974), vol. II, p. 130.

[347] Article 1 of Act No. 619 concerning the Union between Denmark and Iceland of 30 November 1918 (Dareste and Dareste, *op. cit.* (Europe), vol. I, 4th edition, wholly revised, p. 413.

several attempts to unite, especially in Central America. Two examples merit attention and should be considered in the context of the present study.

(a) *Greater Republic of Central America*

437. This uniting of States resulted from the Treaty signed on 20 June 1895 by the three Republics of El Salvador, Honduras and Nicaragua [348] which, under the terms of article I, wished to constitute "a single political entity for the exercise of their external sovereignty under the denomination of the Greater Republic of Central America". The States concerned did not, however, intend thereby to renounce their internal autonomy. Article II states:

The Signatory Governments do not by the present Agreement renounce their autonomy or independence as regards the management of internal affairs; and the Constitutions and accessory laws of each State shall remain in force, so far as they are not opposed to the present stipulations.

438. Each State of the Union retained its financial autonomy, and article XIII of the Treaty provides that "the salaries of the members of the Diet shall be fixed by their respective governments, and the general expenses shall be divided in equal parts". In these circumstances, it seems legitimate to say that the Union in no way intended to assume the debts of the predecessor States, which thus presumably remained for those debts.

This conclusion emerges even more clearly in the case of the Treaty establishing the Republic of Central America.

(b) *Republic of Central America*

439. The Treaty of 1895 provided that the Greater Republic of Central America should be named the Republic of Central America once the Treaty had been accepted by the Republics of Costa Rica and Guatemala. That step was taken in the Treaty of 15 June 1897, [349] which confirmed the internal autonomy of the States constituting the Republic of Central America. Article III provides:

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.

440. The 1897 Treaty was more specific than that of 1895 with regard to the treatment of debts. It expressly states, in article XXXVII, 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". Feilchenfeld, referring to this article, concludes that "the debts of the component States were not assumed by the new State". [350] An equally plausible conclusion would have been that, if debts contracted in the future were to remain the responsibility of each State, that could mean *a contrario* that past debts were assumed by the union. Logically, however, neither solution seems sounder than the other. The new State was short-lived and the union was dissolved in 1898. [351] A further attempt to form a union was to be made in 1921.

(c) *Federation of Central America*

441. The Covenant of Union of Central America of 19 January 1921, [352] whereby the Republics of Costa Rica, El Salvador, Guatemala and Honduras established the Federation of Central America, was even more explicit about the treatment of debts than the treaties of 1895 and 1897. Under article 5, paragraph (*l*), the Covenant provided:

The Federal Government shall administer the national finances, which shall be distinct from those of the States. Federal revenues and taxes shall be created by law.

The internal autonomy of the States in financial matters having thus been confirmed, article 5, paragraph (*m*), could provide:

The States shall continue the administration of their present internal and external debts. The Federal Government shall be under an obligation to see that the said administration is faithfully carried out, and that the revenues pledged thereto are earmarked for that purpose.

442. This provision is quite unambiguous; the Covenant made no stipulation for succession by the Federation to debts of the States. It stipulated, moreover, that the Federation should oversee the financial commitments of the States to prevent them from contracting foreign debts at haphazard. In a second subparagraph, paragraph (*m*) provides:

In future none of the States shall be able to make a contract, or to issue foreign loans, without the authorization of a law of the State and the ratification of a Federal Law, or make any contracts which might in any way compromise its sovereignty, its independence or the integrity of its territory.

The Federation itself was subject to particularly severe conditions of authorization if it wished to issue a loan.

C. Recent examples of uniting of States

1. Case of Malaysia

443. Two mergers of States have occurred in Malaysia. First came the formation in 1957 of the Federation of Malaya, which was succeeded by Malaysia in 1963. The diplomatic and constitutional instruments organizing those two federations included various provisions concerning the problem of succession to debts.

(a) *Constitution of the Federation of Malaya (1957)* [353]

444. The Malayan Constitution contains a long article 167 entitled "Rights, liabilities and obligations". Its main provisions are the following:

(1) ... all rights, liabilities and obligations of—

(*a*) Her Majesty in respect of the government of the Federation, and

[348] G. F. de Martens, ed., *op. cit.* (1905), 2nd series, vol. XXXII, p. 276.

[349] *Ibid.*, p. 279.

[350] Feilchenfeld, *op. cit.*, p. 379.

[351] G. F. de Martens, ed., *op. cit.*, vol. XXXII, p. 284.

[352] League of Nations, *Treaty Series*, vol. 5, p. 19.

[353] *Materials on succession of States* (United Nations publication, Sales No. E/F.68.V.5), p. 93.

(*b*) the Government of the Federation or any public officer on behalf of the Government of the Federation,

shall on and after Merdeka Day [the date of uniting] be the rights, liabilities and obligations of the Federation.

(2) ... all rights, liabilities and obligations of—

(*a*) Her Majesty in respect of the government of Malacca or the government of Penang,

(*b*) His Highness the Ruler in respect of the government of any State, and

(*c*) the government of any State,

shall on and after Merdeka Day be the rights, liabilities and obligations of the respective States.

445. These provisions thus appear to indicate that each State entity was concerned only with the assets and liabilities of its particular sphere. "Rights, liabilities and obligations" were apportioned in accordance with the division of spheres of competence established between the Federation and the member States. Debts contracted were thus the responsibility of the States in respect of matters falling within their respective spheres of competence at the date of uniting. Article 167 continues:

(3) All rights, liabilities and obligations relating to any matter which was immediately before Merdeka Day the responsibility of the Federation Government but which on that date becomes the responsibility of the Government of a State, shall on that day devolve upon that State.

(4) All rights, liabilities and obligations relating to any matter which was immediately before Merdeka Day the responsibility of the Government of a State but which on that day becomes the responsibility of the Federal Government, shall on that day devolve upon the Federation.

Similar provisions are to be found in the *Malaysia Act* of 1963.

(b) *Malaysia Act, 1963*

446. In the Malaysia Bill, specifically in part IV, relating to transitional and temporary provisions, there is a section 76 entitled: "Succession to rights, liabilities and obligations", which reads as follows:

(1) All rights, liabilities and obligations relating to any matter which was immediately before Malaysia Day the responsibility of the government of a Borneo State or of Singapore, but which on that day becomes the responsibility of the Federal Government, shall on that day devolve upon the Federation, unless otherwise agreed between the Federal Government and the government of the State.

(2) This section does not apply to any rights, liabilities or obligations in relation to which section 75 has effect, nor does it have effect to transfer any person from service under the State to service under the Federation or otherwise affect any rights, liabilities or obligations arising from such service or from any contract of employment; but, subject to that, in this section rights, liabilities and obligations include rights, liabilities and obligations arising from contract or otherwise.

(3) The Attorney-General shall on the application of any party interested in any legal proceedings, other than proceedings between the Federation and a State, certify whether any right, liability or or obligation is by virtue of this section a right, liability of obligation of the Federation or of a State named in the certificate, and any such certificate shall for the purposes of those proceedings be final and binding on all courts, but shall not operate to prejudice the rights and obligations of the Federation and any State as between themselves.

(4) In this section references to the government of a State include the government of the territories comprised therein before Malaysia Day. [354]

A mechanism was thus provided for the division of rights and liabilities between the Federation and the member States similar to that in the Constitution of the Malayan Federation (1957).

447. Similar provisions will be noted in the individual Constitutions of the member States of the Federation. For example, article 50 of the Constitution of the State of Sabah, concerning rights, liabilities and obligations, states:

(1) All rights, liabilities and obligations of Her Majesty in respect of the government of the colony of North Borneo shall on the commencement of this Constitution become rights, liabilities and obligations of the State.

(2) In this article rights, liabilities and obligations include rights, liabilities and obligations arising from contract or otherwise, other than rights to which article 49 applies. [355]

2. Provisional Constitution of the United Arab Republic (5 March 1958) [356]

448. As pointed out by the Special Rapporteur in his eighth report, [357] this Constitution, which effected the merger of Egypt and Syria, has an article 69 on succession to treaties, but makes no mention of succession to property and is not very explicit as regards succession to the debts of the two States. However, article 29 provides that:

The Government may not contract any loans, nor undertake any project which would be a burden on the State Treasury over one or more future years, except with the consent of the National Assembly.

This provision can be interpreted as giving the legislative authority of the United Arab Republic sole power to contract loans, to the exclusion of Syria and Egypt. Furthermore, since article 70 [358] envisages a single budget for the two regions, there may be grounds for agreeing with Professor O'Connell that "the UAR would seem to have been the only entity competent to service the debt of the two regions". [359]

3. Case of Tanzania

449. In the Union of Tanganyika and Zanzibar Act of 26 April 1964, [360] which led to the creation of the United

[354] United Nations, *Treaty Series*, vol. 750, p. 60.

[355] *Ibid.*, p. 110. See also p. 134 (Constitution of the State of Sarawak, article 48) and p. 176 (Constitution of the State of Singapore, article 104).

[356] English text in *International and Comparative Law Quarterly* (London), April 1959, vol. 8, pp. 374-387.

[357] See *Yearbook... 1976*, vol. II (Part One), p. 101, document A/CN.4/292, chap. III, art. 16, para. 29 of commentary.

[358] Article 70 reads as follows:

"A special budget, alongside the State Budget, shall be drawn up and put in force in each of the present regional spheres of each of Syria and Egypt until the coming into effect of the final measures for the introduction of a single budget."

[359] O'Connell, *op. cit.*, p. 386.

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

Republic of Tanzania, there is no express reference to succession to State debts. However, it may be pointed out that borrowing is among the matters reserved to the Federal Parliament and Government, [361] which under the Act of Union are also given very real powers to oversee the States of the Union.

450. The merger brought about by the Act of Union seems indeed to go rather further than strict federalism would require and may be placed somewhere between a federal and a unitary State. That being so, it would not be unreasonable to assume that such a union could not be effected without the federation's accepting responsibility for the debts, if any, of the Republics of Tanganyika and Zanzibar. However, this is not explicitly stated in the Articles of Union.

D. Conclusions to be drawn with respect to State debts

451. The general conclusion that must apparently be drawn from all the examples mentioned above is that, as the Special Rapporteur suggested in his introduction, the treatment of State debts in cases of uniting of States depends basically on the form of the successor State, which is itself determined according to the will of the predecessor States. It may be worth while to recall that the uniting of States envisaged in this study is one that takes place in accordance with international law. This study is not concerned with annexation or absorption of States, and the few examples that might be construed as of that nature (e.g. the ambiguous case of Italian unity) were used only by way of illustration.

452. The uniting of States is, by definition, an operation that takes place in accordance with law and with the expressed will of the constituent States. It implies in principle the prior existence of States. Hence the merging of States can only be voluntary, and the treatment of debts therefore depends primarily on the tenor of the will of the predecessor States, which will take care to endow the successor State with the constitutional form best suited to their needs.

453. If the predecessor States effect a merger that completely annihilates their legal personality, then they clearly intended to constitute a unitary State. To this extent, it seems logical for the new State to succeed to the debts of the predecessor States. In fact, this is generally accepted in the literature. For instance, Fauchille writes: "When States merge to form a new State, their debts become the responsibility of that State." [362]

454. If, on the other hand, States unite but retain some degree of competence with respect, for example, to their internal affairs, which necessarily implies a degree of responsibility for the management of those affairs, it stands to reason that the prime area in which the exercise of such responsibility should be left to them is that of debts contracted before the uniting of States. Thus, one writer considered that "if provinces ... are united only by a federal link, if they retain some autonomy and are responsible for managing their own finances and meeting their own expenses, there is no reason to make the federal power responsible for obligations that it did not contract". [363]

455. It is quite clear that the degree of autonomy retained by the States, which gives a reasonably accurate indication of the extent of the merger, must be taken into consideration in determining the treatment of debts in cases of succession. Some federations are closer to unitary States, and in that case responsibility for the debts of the predecessor States lies with the federation, despite the supposed formal internal autonomy of the constituent States. As for confederations and the various kinds of personal and real unions, there can be no doubt that States that establish such links retain the greater part, if not all, of their sovereignty. In such cases, each State should continue to be responsible for its own debts.

456. In view of the above considerations, the Special Rapporteur propose the following draft article:

Article W. Treatment of State debts in cases of uniting of States

On the uniting of two or more States in one State, the successor State thus formed shall not succeed to the debts of the constituent States unless:

(a) the constituent States have otherwise agreed, or

(b) the uniting of States has given rise to a unitary State.

[361] See in particular the schedule setting out the Articles of Union between the Republic of Tanganyika and Zanzibar, in A. J. Peaslee, *op. cit.*, p. 1107.

[362] Fauchille, *op. cit.*, p. 380.

[363] R. Piédelievre, *Précis de droit international public ou droit des gens* (Paris, Cotillon, 1894), vol. I, p. 170.

CHAPTER VII

State debts in cases of dissolution of unions

[*To be drafted later.*]

CHAPTER VIII

State debts in cases of separation of one or more parts of a State

[*To be drafted later.*]