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

Topic:

Succession of States in respect of matters other than treaties

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SUCCESSION OF STATES IN RESPECT OF MATTERS OTHER THAN TREATIES

[Agenda item 3]

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Tenth report on succession of States in respect of matters other than treaties

by Mr. Mohammed Bedjaoui, Special Rapporteur

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

[*Original: French*]
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* For the previous draft articles on succession to State debts submitted by the Special Rapporteur, see the ninth report (*Yearbook ... 1977*, vol. II (Part One), p. 45, document A/CN.4/301 and Add.1).

ABBREVIATION

IBRD International Bank for Reconstruction and Development

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.

Introduction

1. At the twenty-ninth session of the International Law Commission, the Special Rapporteur submitted his ninth report,[1] in which he discussed the problems raised by succession to State debts and proposed a set of articles for solving them, thus complying with the guidelines laid down by the General Assembly in its resolutions 3315 (XXIX), 3495 (XXX) and 31/97.

2. After having nearly completed its consideration of the report, the International Law Commission, provisionally adopted the following articles, which form part of part II of the draft articles on succession of States in respect of matters other than treaties:

PART II

SUCCESSION OF STATES TO STATE DEBTS

SECTION 1. GENERAL PROVISIONS

Article 17. Scope of the articles in the present Part

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

Article 18. State debt

For the purposes of the articles in the present Part, "State debt" means any [international] financial obligation which, at the date of the succession of States, is chargeable to the State.

Article 19. Obligations of the successor State in respect of State debts passing to it

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 articles in the present part.

Article 20. Effects of the passing of State debts with regard to creditors

1. The succession of States does not as such affect the rights and obligations of creditors.

2. An agreement between predecessor and successor States or, as the case may be, between successor States concerning the passing of the State debts of the predecessor State cannot be invoked by the predecessor or the successor State or States, as the case may be, against a creditor third State or international organization [or against a third State which represents a creditor] unless:

[1] *Yearbook ... 1977*, vol. II (Part One), p. 45, document A/CN.4/301 and Add.1.

(*a*) the agreement has been accepted by that third State or international organization; or

(*b*) the consequences of that agreement are in accordance with the other applicable rules of the articles in the present Part.

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

Article 21. Transfer of part of the territory of a State

1. When a part of the territory of a State is transferred by that State to another State, the passing of the State debt of the predecessor State to the successor State is to be settled by agreement between the predecessor and successor States.

2. In the absence of an agreement, an equitable proportion of the State debt of the predecessor State shall pass to the successor State, taking into account, *inter alia*, the property, rights and interests which pass to the successor State in relation to that State debt.

Article 22. Newly independent States

When the successor State is a newly independent State:

1. No State debt of the predecessor State shall pass to the newly independent State, unless an agreement between the newly independent State and the predecessor State provides otherwise in view of the link between the State debt of the predecessor State connected with its activity in the territory to which the succession of States relates and the property, rights and interests which pass to the newly independent State.

2. The provisions of the agreement referred to in the preceding paragraph should not infringe the principle of the permanent sovereignty of every people over its wealth and natural resources, nor should their implementation endanger the fundamental economic equilibria of the newly independent State.

3. Thus, the International Law Commission adopted various articles containing general provisions and others containing specific provisions relating to each type of succession of States. Among the provisions relating to particular types of succession, draft article 21 concerns the case of the transfer of part of the territory of a State, while draft article 22 relates to newly independent States. In order to complete its work on this part, the Commission therefore still has to consider the treatment of State debts in the case of the other three types of succession of States, namely, the uniting of States, the separation of one or more parts of a State and the dissolution of a State.

4. With regard to the uniting of States, the Special Rapporteur submitted a report[2] in which he proposed a draft article W in the following terms:

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.

At its thirtieth session, the Commission is expected to consider that report, which it did not have time to study at its previous session, and to take a decision on draft article W, which might become article 23.

5. Accordingly, the specific purpose of the present report is to propose draft articles on the treatment of State debts in cases of separation of one or more parts of a State and of the dissolution of a State. The Special Rapporteur intends to submit, as Part III of his draft articles, a provision relating to the procedure for the peaceful settlement of disputes that might arise in the context of a succession of States. All that would then remain to be considered at the Commission's thirty-first session would be the possibility of including, in compliance with the wish expressed by the Commission, some articles concerning succession in respect of State archives, to complete the set of draft articles on succession to State property and State debts.

[2] *Ibid.*, p. 107 *et seq.*, document A/CN.4/301 and Add.1, chap. VI.

CHAPTER I

Uniting of States

[See *Yearbook ... 1977*, vol. II (Part One), pp. 107 *et seq.*, document A/CN.4/301 and Add.1, chap. VI]

CHAPTER II

Separation of a part or parts of the territory of a State

6. A typological problem still requires some explanations and a choice will no doubt have to be made. In the draft articles on succession of States in respect of treaties[3] which were submitted to the United Nations Conference on the Succession of States in respect of Treaties, the International Law Commission included a part IV dealing with the problems grouped under the heading "Uniting and separation of States". The relevant provisions concerned the cases of (*a*) *the uniting of States*, defined as the case of "two or more States [which] unite and so form one

[3] *Yearbook ... 1974*, vol. II (Part One), pp. 174 *et seq.*, document A/9610/Rev.1, chap. II, sect. D.

successor State" (article 30); and (*b*) *the separation of a State*, defined as the case of "a part or parts of the territory of a State [which] separate to form one or more States, whether or not the predecessor State continues to exist" (article 33).[4] Thus, the draft submitted to the Conference dealt, firstly, with the uniting of States and, secondly, with the separation of a State, without, in the latter case, making a distinction according to whether or not the predecessor State continues to exist.[5]

7. The draft articles on succession of States in respect of matters other than treaties,[6] on the other hand, in Part I entitled "Succession to State property", relate to more precisely defined situations: (*a*) *the uniting of States*, defined as the case of "two or more States [which] unite and thus form a successor State" (article 14); (*b*) *the separation of part or parts of the territory of a State*, which occurs "when a part or parts of the territory of a State separate from that State and form a State" (article 15), it being understood that the predecessor State *continues to exist* after such separation; and (*c*) *the dissolution of a State*, which occurs "when a predecessor State dissolves and *disappears** and the parts of its territory form two or more States" (article 16).

8. The Commission explained its choices in these words:

> (4) In its work of codification and progressive development of the law relating to succession of States in respect of treaties and to succession of States in respect of matters other than treaties, the Commission has constantly borne in mind the desirability of maintaining some degree of parallelism between the two sets of draft articles and in particular, as far as possible, the use of common definitions and common basic principles, without thereby ignoring or dismissing the characteristic features that distinguish the two topics from one another. The Commission has considered that, so far as is possible without distorting or unnecessarily hindering its work, the parallelism between the two sets of draft articles should be regarded as a desirable objective. Nevertheless, as regards the present draft, the required flexibility should be allowed in order to adopt such texts as best suit the purposes of the codification, in an autonomous draft, of the rules of international law governing specifically succession of States in respect of matters other than treaties and, more particularly, succession to State property.
>
> (5) In the light of the foregoing, the Commission, while reaffirming its position that for the purpose of codifying the modern law of succession of States in respect of treaties it was sufficient, as it did in the 1974 draft, to arrange the cases of succession of States under the three broad categories ...,[7] nevertheless found that, in view of the characteristics and requirements peculiar to the subject of succession of States in respect of matters other than treaties, particularly as regards succession to State property, some further precision in the choice of types of succession was necessary for the purpose of the draft now being prepared. ... as regards the *uniting and separation of States*, the Commission, while following the pattern of dealing in separate articles with those two types of succession, nevertheless found it appropriate to distinguish between the "separation of part or parts of the territory of a State", which is the subject of article 15, and the "dissolution of a State", which forms the subject of article 16.[8]

9. For the sake of the parallelism, clarity and, indeed, internal consistency of the set of draft articles on succession in respect of State property and State debts, the Special Rapporteur intends, in dealing with succession to debts, to follow the same typology as that chosen for succession to property. This chapter will therefore deal with the separation of part or parts of the territory of a State where that State continues to exist after such separation.

A. Practice of States

10. In the present context, reference may be made to some relevant examples taken from the practice of States. It should be noted, first of all, that, prior to the establishment of the United Nations, most examples of secession were to be found among cases of the "secession of colonies", because colonies were considered, through various legal and political fictions, as forming "an integral part of the metropolitan country". These cases are therefore not relevant to the situation being considered here, that of the separation of parts of a State, since, according to contemporary international law, these are newly independent States resulting from decolonization under the Charter of the United Nations.

Since the establishment of the United Nations, there have been only three cases of secession which were not cases of decolonization: the separation of Pakistan from India, the withdrawal of Singapore from Malaysia and the secession of Bangladesh. One writer reports that, in the case of Pakistan, an Expert Committee was appointed on 18 June 1947 to consider the problem of the apportionment of the property of British India; the presumption guiding its deliberations was that "India would remain a constant international person and Pakistan would constitute a successor State".[9]

Apart from these cases, some of which were more or less concomitants of the process of decolonization, reference may be made to the case of the formation of the Irish Free State, which preceded the establishment of the United Nations.

1. Establishment of the Irish Free State (1922)

11. By a treaty dated 6 December 1921, Ireland obtained from the United Kingdom the status of a

[4] See also draft article 34 relating to the "separation of any part of the territory of a State [when] the predecessor State continues to exist".

[5] This is the situation expressly provided for in article 33, applicable to two cases of survival and also of disappearance of the predecessor State. The subsequent article 34, however, dealt with the specific case where any part of a State's territory is separated and the predecessor State continues to exist.

[6] *Yearbook ... 1977*, vol. II (Part Two), pp. 56 *et seq.*, document A/32/10, chap. III, sect. B.1.

[7] These are: (*a*) succession in respect of part of the territory; (*b*) newly independent States; (*c*) uniting and separation of States.

[8] *Yearbook ... 1976*, vol. II (Part Two), p. 129, document A/31/10, chap. IV, sect. B.2, paras. 4 and 5 of the introductory commentary to section 2 of part I of the draft.

[9] D. P. O'Connell, *State Succession in Municipal and International Law*, vol I (Cambridge University Press, 1967), p. 220.

Dominion and became the Irish Free State. The Treaty apportioned debts between the predecessor State and the successor State in the following terms:

The Irish Free State shall assume liability for the service of the Public Debt of the United Kingdom as existing at the date hereof and towards the payment of war pensions as existing at that date in such proportion as may be *fair and equitable,** having regard to any *just claims** on the part of Ireland by way of set-off or counter-claim, the amount of such sums being determined in default of agreement by the arbitration of one or more independent persons being citizens of the British Empire.[10]

12. The Treaty referred to illustrates strikingly the primacy of the *principle of equity* in the apportionment of debts. In very terse language, article V states the principle of equity, the means of implementing it, the acceptance, precisely in the name of equity, of any claims or counter-claims on the part of Ireland and the establishment of a procedure for the peaceful settlement of disputes.

2. The secession of Singapore (1965)

13. Singapore became part of the Federation of Malaya under an agreement dated 9 July 1963. Paragraph 1 of section 76 of of the "Malaysia Bill"[11] annexed to the Agreement, entitled "Succession to rights, liabilities and obligations", reads as follows:

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.[12]

That provision thus operated a transfer of rights, but also of obligations, of the States to the Federation, except as otherwise agreed by the Governments concerned.

14. By contrast, there seems to have been a practically mechanical return to the *status quo ante* when Singapore withdrew from the Federation and achieved independence on 9 August 1965. Article VIII of the "Agreement relating to the separation of Singapore from Malaysia as an independent and sovereign State", signed at Kuala Lumpur on 7 August 1965, provides that:

With regard to any agreement entered into between the Government of Singapore and any other country or corporate body has been guaranteed by the Government of Malaysia, the Government of Singapore hereby undertakes to negotiate with such country or corporate body to enter into a fresh agreement releasing the Government of Malaysia of its liabilities and obligations under the said guarantee, and the Government of Singapore hereby undertakes to indemnify the Government of Malaysia fully for any liabilities, obligations or damage which it may suffer as a result of the said guarantee.[13]

15. The Constitution of Malaysia (Singapore Amendment) Act, 1965, also contains some provisions relating to "succession to liabilities and obligations", including the following paragraph:

9. All property, movable and immovable, and rights, liabilities and obligations which before Malaysia Day belonged to or were the responsibility of the Government of Singapore and which on that day or after became the property of or the responsibility of the Government of Malaysia shall on Singapore Day revert to and vest in or devolve upon and become once again the property of or the responsibility of Singapore.[14]

16. This is a case of secession which is akin to the dissolution of a union or of a federation of States. The federal or confederal nature of the grouping, which to some extent tended to preserve the identity of the components, and the short life-span of the union, which did not have time to achieve a more far-reaching integration, probably contributed to the nearly total and practically automatic return to the *status quo ante* in respect of property and of debts. But it is perfectly clear that cases of this kind are not typical.

3. The secession of Bangladesh (1973)

17. The apportionment between Bangladesh and Pakistan of the State debts contracted by Pakistan before the secession of Bangladesh does not seem to have been settled at the time of writing. The problem remains pending, particularly since the negotiations between the two States conducted at Dacca from 27 to 29 June 1974 ended in failure. In this connexion, one writer has stated that "Bangladesh claimed 56 per cent of all common property, while at the same time remaining very reticent as regards the apportionment of existing debts, a problem which apparently it did not want to tackle until after settlement of the apportionment of assets—an approach which Pakistan is said to have refused".[15]

18. As the Special Rapporteur indicated in his eighth report, however, the Government of Pakistan agreed to accept continued responsibility, after 1 July 1973 and up to 30 June 1974, for the debt of the former Pakistan State.[16]. It was during that one-year period that the two States were to have conducted negotiations with a view to apportioning the State debt; these negotiations were abortive.[17]

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[10] Article V of the Treaty of 6 December 1921 between Great Britain and Ireland (League of Nations, *Treaty Series*, vol. XXVI, p. 10).

[11] Entered into force on 16 September 1963, pursuant to article II of the Agreement of 9 July 1963, as amended by the Agreement of 28 August 1963.

[12] United Nations, *Treaty Series*, vol. 750, p. 60.

[13] *Ibid.*, vol. 563, p. 89.

[14] Annex B to the Agreement of 7 August 1965 (*ibid.*, p. 98).

[15] C. Rousseau, *Droit international public*, vol. III (Paris, Sirey, 1977), p. 454.

[16] See *Yearbook ... 1976*, vol. II (Part One), p. 109, document A/CN.4/292. chap. III, art. 17, para. 59 of the commentary.

[17] See the reply of the French Minister of Economic Affairs and Finance to a written question from a deputy, Mr. Raymond Offroy, in: France, *Journal Officiel de la République française, Débats parlementaires: Assemblée nationale* (Paris), 8 September 1973, No. 62 A.N., pp. 3672–3673, and *Annuaire Français de droit international, 1973* (Paris), vol. XIX (1974), p. 1074.

B. Comments and proposals

19. As can be gathered from the foregoing passages, the practice of States in the case of separation of a part or parts of a State is not very abundant, nor is it easy to obtain information about it. That being so, one possible approach would be, of course, to treat the agreement between the parties concerned as the fundamental basis of the rule to be established, particularly since the agreement is, in any case, essential and since the rules which the Commission is trying to work out are not meant to be more than residual in nature. By analogy with the provisions in article 21,[18] which relate to the treatment of State debts in the case of the transfer of part of the territory of a State, the prospective provision would then state that, in the case of the separation of a part or of parts of the territory of a State, the passing of the State debt of the predecessor State to the successor State is settled by agreement between the two States. Only in the absence of agreement would the principle of equity be relied upon.

20. Such a rule, modelled on that in article 21, would, however, disregard the essential differences that distinguish the case of the separation of part or parts of the territory of a State from the case of the transfer of a part of a State's territory. In this respect, the Commission has already expressed a clear preference by deciding to treat the case of the transfer of a part of a State's territory as involving usually a transfer of a relatively small and relatively unimportant territory, according to theoretically peaceful procedures and, in principle, by agreement between the ceding State and the beneficiary State.

The case of the separation of a part or parts of the territory of a State is very different. It involves a territorial secession which should be regarded as being quite important in itself, for its *de facto* consequence is the establishment of a State. In such a case, it is far from certain that the secession always takes place by agreement. Indeed, there is a strong presumption that there is no agreement. The example of the secession of Bangladesh is typical of such a situation. Accordingly, it would be quite unrealistic to make the agreement the essential basis for the rule to be formulated, for, in such a case, the rule would probably be unworkable.

21. It seems more to the point, therefore, to refer to the principle of equity, as applied hitherto in the rest of the draft articles. It is a basic element of any settlement. If this principle is followed, then, *ipso facto* and in all fairness, it will be necessary to envisage a certain unavoidable parallelism between the earlier rules concerning the passing of State property and the future rules concerning succession to State debts. In this connexion, the provisions in article 15, which deal with the passing of State property in the case of the separation of a part or parts of a State's territory may, to a large extent, serve as a model. Some correlation would have to be established between State debts and the property rights and interests which pass to the successor State in connexion with the State debts. The paramount criterion should be the observance of the principle of equity, which remains the foundation of the entire structure and which should make it possible to take account of any compensation, any "just and equitable claim" or similar counter-claim, in short to establish an essential balance in the apportionment of debts between the two States concerned.

22. A provision along the following lines might therefore be proposed:

> "1. If a part or parts of the territory of a State should separate from that State and form a State, then, unless the predecessor State and the successor State agree otherwise, an equitable proportion of the State debts of the predecessor State shall pass to the successor State, taking into account, *inter alia*, the property, rights and interests which pass to the successor State in relation to that State debt."

The agreement between the parties is in the most appropriate place in this formulation.

23. It will be remembered that the Commission decided that, for the purposes of the codification of the rules of international law relating to succession of States in respect of matters other than treaties, it was appropriate to make a distinction between, and to deal separately with, three cases which, in the 1974 draft on succession of States in respect of treaties,[19] formed the subject of a single provision, namely, article 14; the three cases are: (*a*) the case where part of the territory of a State is transferred by that State to another State (art. 12); (*b*) the case where a part of the territory of a State separates from that State and unites with another State (art. 15, para. 2); (*c*) the case where a dependent territory becomes part of the territory of a State other than the State which was responsible for its international relations (art. 13, para. 5).

24. In the Commission's view, the case of the transfer of territory from one State to another is one where the fact of the replacement of the predecessor State by the successor State in the responsibility for the international relations of the part of the territory concerned does not presuppose the consultation of the population of that part of territory, in view of the minor political, economic, strategic, etc. importance of that part of territory or the fact that it is scarcely inhabited, if at all. Such a case was clearly distinguished from that dealt with in article 15, paragraph 2, in which a part of the territory of a State separates from that State and unites with another State. In the case of such separation, as opposed to

[18] For the text of the articles adopted so far by the Commission, see *Yearbook ... 1977*, vol. II (Part Two), pp. 56 *et seq.*, document A/32/10, chap. III, sect. B.1.

[19] For reference, see foot-note 3 above.

the case of the transfer of a part of territory the territorial change presupposes the expression of a conforming will on the part of the population of the separating part of territory as a consequence of the geographical size and large number of inhabitants of that part of territory or of its political, economic or strategic importance.

25. It was in the light of such considerations that the Commission extended the scope of the rule embodied in article 15 to the case where a part of a State's territory separates from that State and unites with another existing State. Much the same approach should be followed with respect to the passing of State debts in the draft article now under consideration. Accordingly, the Commission might incline to the view that the provisions suggested above for the passing of State debts in the case of separation of a part or parts of the territory of a State should apply also in the case where part of a State's territory separates from that State and unites with another State.

26. In the light of the foregoing remarks, the Special Rapporteur proposes the following draft article:

Article 24. Separation of a part or parts of the territory of a State

1. If a part or parts of the territory of a State should separate from that State and form a State, then, unless the predecessor State and the successor State agree otherwise, an equitable proportion of the State debts of the predecessor State shall pass to the successor State, taking into account, *inter alia*, the property, rights and interests which pass to the successor State in relation to that State debt.

2. The provisions of paragraph 1 shall apply in the case where a part of the territory of a State separates from that State and unites with another State.

CHAPTER III

Dissolution of a State

27. The situation considered under this heading is that of the total disappearance of the predecessor State as a result of its breaking up or dismemberment. None of the parts of its territory constituted into as many separate States can be regarded, legally, as the continuation of the predecessor State. One example of this case is that of the total dismemberment of a unitary State. Another, and more common, example is that of the dissolution of a federal or confederal State, where the union, federation or confederation is replaced by its original component States.

28. Historical precedents that may be cited for both these cases of dissolution of a State are: the dissolution of Great Colombia (1829-1831); the separation of Belgium and Holland (1830); the dissolution of the union of Norway and Sweden (1905); the disappearance of the Austro-Hungarian Empire (1919); the break-up of the Danish-Icelandic union (1944); the termination of the Federation of Mali (1960); the dissolution of the United Arab Republic (1960); and the dissolution of the Federation of Rhodesia and Nyasaland (1963).

The purpose of the present study is to determine the treatment of State debts after the dissolution of a unitary State or a union. For this purpose, dissolution may be defined as the reverse of the process of the uniting of States.

A. Practice of States

1. The dissolution of Great Colombia (1831)

29. Great Colombia, formed in 1821 by the union of New Granada, Venezuela and Ecuador, was not to be long-lived. Within about ten years, internal struggles put an end to the union, whose dissolution was totally consummated in 1831.[20]

30. The successor States agreed to assume responsability for the debts of the union. New Granada and Ecuador first established the principle in the Treaty of Peace and Friendship between the States of New Granada and Ecuador, concluded at Pasto on 8 December 1832. Article VII of the Treaty provides as follows:

> It has been agreed, and is hereby agreed, in the most solemn manner, and under the Regulations of the Laws of both States, that New Granada and Equador shall pay such share of the Debts, Domestic and Foreign, as may proportionably belong to them as integral parts which they formed, of the Republic of Colombia, which Republic recognized the said debts *in solidum*. Moreover, each State agrees to answer for the amount of which it may have disposed belonging to the said Republic".[21]

31. Then there was the Convention between New Granada and Venezuela relative to the debt of the late Republic of Colombia, signed at Bogotá on 23 December 1834, to which Ecuador subsquently acceded on 17 April 1837.[22]. These last two instruments indicate that the successor States were to apportion the debts of Great Colombia among themselves in the following proportions: New Granada, 50 per cent; Venezuela, 28.5 per cent; and Ecuador, 21.5 per cent.[23]

[20] Cf. V.-L. Tapie, *Histoire de l'Amérique latine au XIX^e siècle* (Paris, Montaigne, 1945), See, in particular, the discussion of the break-up of Great Colombia, pp. 57–60.

[21] *British and Foreign State Papers, 1832–1833* (London, Ridgway, 1836), vol. XX, p. 1209.

[22] *Ibid., 1834–1835* (London, Ridgway, 1852), vol. XXIII, p. 1342; also, E. H. Feilchenfeld, *Public Debts and State Succession* (New York, Macmillan, 1931) pp. 296–298 (particularly p. 296, where the relevant articles of the Convention are quoted).

[23] A. Sánchez de Bustamante y Sirvén, *Droit international public*, translation in French by P. Goulé (Paris, Sirey (1936), vol. III,

(continued)

32. Almost 50 years after their apportionment among the three successor States, the debts of Great Colombia gave rise to two arbitral awards made by the Mixed Commission of Caracas, set up between Great Britain and Venezuela under an agreement of 21 September 1868. These were the awards made in the two famous *Sarah Campbell* and *W. Ackers-Cage* cases,[24] in which two claimants – Alexander Campbell (later, his widow, Sarah Campbell) and W. Ackers-Cage – sought to obtain from Venezuela payment of a debt owing to them by Great Colombia. Sturup, the referee, in his award of 1 October 1869, held that "the two claims should be paid by the Republic. However, since they both form part of the country's external debt, *it would be unjust** to require that they be paid in full".[25]

33. In their commentary on this award, de Lapradelle and Politis consider that "the responsibility of Venezuela for the debts of the former Republic of Colombia, from which it had originated, was not and could not be contested ..." because, in the opinion of the authors (citing Bonfils and Fauchille), it can be regarded as a rule of international law that "where a State ceases to exist by breaking up or by dividing into several new States, the new States should each bear, *in an equitable proportion*,* a share of the debts of the original State as a whole".[26] Charles Rousseau takes the same view and adds pertinently that "the referee Sturup *simply took account of the resources of the successor State in imposing an equitable reduction of the amount of the claims*".*[27] From the point of view of effective codification and progressive development in this field, allowance must certainly be made for the financial situation of the successor State.

2. The break-up of the Netherlands (1830-1839)

34. The break-up of the Belgian-Dutch State in 1830 has been described as "one of the oddest cases because of the numerous negotiations to which it gave rise and the statements made in the course of those negotiations".[28] What came to be known as "the Belgian-Dutch question" had necessitated the intervention of the five Powers of the Holy Alliance, in the form of a conference which opened in London in 1830 and which culminated only in 1839 in the signing of the Treaty of London on 19 April of that year.[29]

For a better understanding of the treatment of the debts of the Netherlands upon the dismemberment of that State, it seems useful first to describe how the "States" concerned dealt with this question when they joined together and then to see how the succession to the debts of the Netherlands was settled upon that country's dismemberment in 1830.

(a) *State debts during the period of the Belgian-Dutch union*

35. Belgium and the Netherlands were united by an Act of 21 July 1814.[30] Article 1 of the Act states that

> This union shall be *intimate and complete so that the two countries form but one single State*,* governed by the Constitution already established in Holland, which will be modified by agreement in accordance with the new circumstances.

In view of the "intimate and complete" nature of the union thus achieved, article VI of the Act quite naturally concluded that:

> Since the burdens as well as the benefits are to be common, debts contracted up to the time of the union by the Dutch Provinces on the one hand and by the Belgian Provinces on the other, shall be borne by the General Treasury of the Netherlands.

The Act of 21 July 1814 was later annexed to the General Act of the Congress of Vienna[31] and the article VI cited was invoked on a number of occasions to provide guidance for the apportionment of the debts between Holland and Belgium.

(b) *The London Conference for the "settlement of the affairs of Holland and Belgium" (1830-1839)*[32]

36. During the nine years it took to settle the problems created by the dissolution of the union of Belgium and Holland, no fewer than 15 diplomatic documents had to be prepared before the claims regarding the debts of the Kingdom of the Netherlands could be settled. There is little point in recapitulating in detail the tortuous course of these proceedings. The passages which follow describe only the essential points, specifically citing a few of the relevant texts and the final Treaty of London of 19 April 1839.

(i) *The "proposals for settlement"*

It was on the initiative of the five Powers of the Holy Alliance that the various draft texts which led to the final settlement were prepared.

a. The Twelfth Protocol of the London Conference, dated 27 January 1831[33]

(Foot-note 23 continued)

p. 337; H. Accioly, *Traité de droit international public*, translation into French by P. Goulé (Paris, Sirey, 1940), vol. I, p. 199; O'Connell, *op. cit.* p. 338.

[24] A. de Lapradelle and N. Politis, *Recueil des arbitrages internationaux*, vol. II (Paris, Pedone, 1923), pp. 552–556.

[25] *Ibid.*, pp. 554 and 555.

[26] *Ibid.*, p. 555.

[27] Rousseau, *op. cit.* p. 431.

[28] Sánchez de Bustamante y Sirvén, *op. cit.*, p. 336.

[29] Treaty made and signed in London on 19 April 1839 between Belgium and Holland, relative to the separation of their respective territories. See *British and Foreign State Papers, 1838–1839* (London, Harrison, 1856), vol. XXVII, p. 1000. The five Powers of the Holy Alliance were Austria, France, Great Britain, Prussia and Russia.

[30] *Acte signé par le Secrétaire d'Etat de S.A.R. le Prince des Pays-Bas pour l'acceptation de la souveraineté des provinces belgiques sur la base convenue* (The Hague, 21 July 1814) (see *British and Foreign State Papers, 1814–1815* (London, Ridgway, 1839), vol. II, p. 141).

[31] See G. F. de Martens, ed., *Nouveau Recueil de traités* (Goettingen, Dieterich, 1887), vol. II, p. 379. See also Feilchenfeld, *op. cit.*, pp. 123–124.

[32] Feilchenfeld, *op. cit.*, pp. 191–209.

[33] *British and Foreign State Papers, 1830–1831* (London, Ridgway, 1833), vol. XVIII, pp. 761–768.

37. What is known as the "Twelfth Protocol" proved, in fact, to be the first document which proposed a fairly specific mode of settlement of the debts. Its object was to identify the general principles to be applied in the Treaty of London.

(i) The principles

38. The five Powers first sought to justify their intervention by asserting that "experience ... had only too often demonstrated to them the *complete impossibility of the Parties directly concerned agreeing on such matters*,* if the benevolent solicitude of the five Courts did not facilitate agreement".[34] They cited the existence of relevant precedents which they had helped to establish and which "have in the past led to decisions *the principles of which, far from being new, were principles that had always governed the reciprocal relations of States** and which have been cited and confirmed in special agreements concluded between the five Courts; those agreements cannot therefore be changed in any case without the participation of the Contracting Powers".[35]

39. One of the leading precedents relied upon by these five monarchies was apparently the Act of 21 July 1814 cited above,[36] article VI of which, as quoted earlier, provided that "since the burdens as well as the benefits are to be common, debts contracted up to the time of the union by the Dutch Provinces on the one hand and by the Belgian Provinces on the other shall be borne by the General Treasury of the Netherlands", On the basis of this provision, the five Powers drew the conclusion of principle that *"upon the termination of the union, the community in question likewise should probably come to an end and, as a further corollary of the principle, the debts which, under the system of the union, had been merged, might, under the system of separation, be redivided"*.*[37] Applying this principle in the case of the Netherlands, the five Powers concluded that *"each country should first resume exclusive responsibility for the debts which it owed before the union"*;*[38] they considered it desirable to add: *"in fair proportion, the debts contracted since the date of this union and during the period of the union by the General Treasury of the Kingdom of the Netherlands, as they are shown in the budget of that Kingdom"*.*[39]

(ii) The application of the principles: "Bases for establishing the separation of Holland and Belgium"[40]

40. The text of these "bases" is annexed to the Twelfth Protocol of the London Conference, dated 27 January 1831. Articles X and XI of these "bases" read as follows:

Article X. The debts of the Kingdom of the Netherlands for which the Royal Treasury is at present liable, namely (1) the outstanding debt on which interest is payable; (2) the deferred debt; (3) the various bonds of the Amortization Syndicate; and (4) the reimbursable annuity funds secured on State lands by special mortgages, shall be apportioned between Holland and Belgium in proportion to the average share of the direct, indirect and excise taxes of the Kingdom paid by each of the two countries during the years 1827, 1828 and 1829.

Article XI. Inasmuch as the average share in question makes Holland liable for 15/31 and Belgium liable for *16*/31 of the aforesaid debts, it is understood that Belgium will continue to be liable for the payment of appropriate interest.

41. These provisions were objected to by France, which considered that "his Majesty's Government has not found their bases *equitable enough** to be acceptable".[41] The four Courts to which the French communication was addressed replied that:

The principle established in Protocol No. 12 with regard to the debt was as follows: When the Kingdom of the Netherlands was formed by the union of Holland with Belgium, the then existing debts of these two countries were merged by the Treaty of 1815 into a single whole and declared to be the national debt of the united Kingdom. It is therefore necessary and just that, when Holland and Belgium separate, each should resume responsibility for the debt for which it was responsible before their union and that these debts, which were united at the same time as the two countries, should likewise be separated.

Subsequent to the union, the united Kingdom has an additional debt which, upon the separation of the united Kingdom, must be *fairly* apportioned between the two States; the protocol does not, however, specify what exactly the fair proportion should be and leaves this question to be settled later.[42]

42. The Netherlands proved particularly satisfied and its plenipotentiaries were authorized to indicate their full and complete acceptance of all the basic articles designed to establish the separation of Belgium and Holland, which basic provisions derived from the London Protocols dated 20 and 27 January 1831.[43]

43. The Belgian point of view was set forth in a report to the Regent by the Belgian Minister for Foreign Affairs dated 15 March 1831, which stated:

Protocols Nos. 12 and 13, dated 27 January ... have shown in the most obvious manner the (no doubt involuntary) partiality of some of the plenipotentiaries in the Conference. These Protocols, dealing with the fixing of the boundaries, the armistice *and, above all, the apportionment of the debts*,* arrangements which would consummate the ruin of Belgium, were restored ... by a note of 22 February, the last act of the Diplomatic Committee.[44]

Belgium thus rejected the provisions of the "bases designed to establish the separation of Belgium and

[34] *Ibid.*, p. 761. [Translation by the Secretariat.]

[35] *Ibid.*

[36] See para. 35 above.

[37] *British and Foreign State Papers, 1830–1831* (London, Ridgway, 1833), vol. XVIII, p. 762.

[38] *Ibid.* [Translation by the Secretariat.]

[39] *Ibid.*

[40] *Ibid.*, p. 766.

[41] Twentieth Protocol of the London Conference, dated 17 March 1831 (annex A). Communication to the Conference by the plenipotentiary of France, Paris, 1 March 1831 (*ibid.*, p. 786).

[42] *Idem* (annex B). The plenipotentiaries of the four Courts to the plenipotentiary of France (*ibid.*, p. 791). [Translation by the Secretariat.]

[43] Eleventh Protocol of the London Conference, dated 20 January 1831 (determining the boundaries of Holland) (*ibid.*, p. 759) and Eighteenth Protocol, dated 18 February 1831 (*ibid.*, p. 779).

[44] *Ibid.*, p. 1235. [Translation by the Secretariat.]

Holland". More precisely, it made its acceptance dependent on the facilities to be accorded to it by the Powers in the acquisition, against payment, of the Grand Duchy of Luxembourg.

44. The Twenty-fourth Protocol of the London Conference, dated 21 May 1831, clearly showed that "acceptance by the Belgian Congress of the bases for the separation of Belgium from Holland would be very largely facilitated if the five Courts consented to support Belgium in its wish to obtain, against payment, the Grand Duchy of Luxembourg".[45] As Belgium's wish could not be satisfied, that country refused to agree to the debt apportionment proposals which had been made to it. The Powers thereupon took it upon themselves to devise another formula for the apportionment of the debts; this was the object of the Twenty-sixth Protocol of the London Conference.

b. The twenty-sixth Protocol of the London Conference, dated 26 June 1831

45. This new Protocol contained a draft treaty consisting of 18 articles. Article XII stated that

> the debts shall be apportioned in such a way that each of the two countries shall be liable for all the debts which *originally,** before the union encumbered *the territories** composing them and in such a way that debts which were *jointly contracted shall be divided up in a just proportion.**[46]

This was, in fact, only a reaffirmation, not spelt out in figures, of the principle of the apportionment of debts contained in the Twelfth Protocol of 27 January 1831. Unlike that Protocol, however, the new Protocol did not specify the debts for which the parties were liable. This time, it was the Kingdom of the Netherlands which rejected the proposals of the Conference,[47] and Belgium which agreed to them.[48]

46. Before the Conference adjourned on 1 October 1832,[49] it made several unsuccessful proposals and counter-proposals.[50] Not until seven years later did the Belgian-Netherlands treaty of 9 April 1838 devise a solution to the problem of the succession to debts arising out of the separation of Belgium and Holland.

(ii) *The Belgian-Dutch Treaty of London, dated 19 April 1839, relative to the separation of their respective territories*

47. The Belgian-Dutch dispute concerning succession to the State debts of the Netherlands was finally settled by the Treaty of 19 April 1839, article 13 of the annex to which contained the following provisions:

> 1. As from 1 January 1839, Belgium shall, by reason of the apportionment of the public debts of the Kingdom of the Netherlands, continue to be liable for a sum of 5 million Netherlands florins in annuity bonds, the principal of which shall be transferred from the debit side of the Amsterdam ledger or of the ledger of the General Treasury of the Kingdom of the Netherlands to the debit side of the ledger of Belgium.
>
> 2. The principal transferred and the annuity bonds entered on the debit side of the ledger of Belgium in accordance with the preceding paragraph, up to a total of 5 million Netherlands florins in annuity payments, shall be considered as part of the Belgian national debt and Belgium undertakes not to allow, either now or in future, any distinction to be made between the portion of its public debt resulting from its union with Holland and any other existing or future Belgian national debt.
>
> 3. The aforesaid sum of 5 million Netherlands florins of annuities shall be paid regularly every six months, in cash, either at Brussels or at Antwerp, without any deduction of any kind whatever, either now or in future.
>
> 4. By the creation of the said sum of 5 million florins of annuities, Belgium shall be discharged vis-à-vis Holland of any obligation resulting from the apportionment of the public debts of the Kingdom of the Netherlands.

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[45] *Ibid.*, p. 798. [Translation by the Secretariat.]

[46] *Ibid.*, pp. 804 and 805. [Translation by the Secretariat.]

[47] See the Twenty-eighth Protocol of the London Conference, dated 25 July 1831, annex A, "the Government of the Netherlands to the Conference", The Hague, 12 July 1831 (*ibid.*, pp. 808–816 and, in particular, p. 815).

[48] See the Twenty-seventh Protocol of the London Conference, dated 12 July 1831, annex, "the Belgian Government to the Conference", Brussels, 9 July 1831 (*ibid.*, p. 806).

[49] Seventieth (final) Protocol of the London Conference, dated 1 October 1832 (*ibid., 1831–1832* (London, Ridgway, 1834), vol. XIX, p. 184).

[50] These proposals and counter-proposals included those made in two Protocols and a treaty:

(*a*) Forty-fourth Protocol of the London Conference, dated 26 September 1831 (annex A), proposals by the London Conference, item 3 of which contains twelve articles, the first three of which provide that:

> "VII. Belgium, including the Grand Duchy of Luxembourg, shall be liable for the debts which it had lawfully contracted before the establishment of the Kingdom of the Netherlands.
>
> "Debts lawfully contracted from the time of the establishment of the Kingdom until 1 October 1830 shall be equally apportioned.
>
> "VIII. Expenditures by the Treasury of the Netherlands for special items which remain the property of one of the two Contracting Parties shall be charged to it, and the amount shall be deducted from the debt allocated to the other Party.
>
> "IX. The expenditures referred to in the preceding article include the amortization of the debt, both outstanding and deferred, in the proportion of the original debts, in accordance with article VII." (*Ibid., 1830–1831* (London, Ridgway, 1833), vol. XVIII, pp. 867 and 868.

These proposals, which were the subject of strong criticism by both the States concerned, were not adopted.

(*b*) Forty-ninth Protocol of the London Conference, dated 14 October 1831 (annex A), articles concerning the separation of Belgium from Holland, of which the first two paragraphs of a long article XIII read as follows:

> "1. As from 1 January 1832, Belgium shall by reason of the apportionment of the public debts of the Kingdom of the Netherlands, continue to be liable for a sum of 8,400,000 Netherlands florins in annuity bonds, the principal of which shall be transferred from the debit side of the Amsterdam ledger or of the ledger of the General Treasury of the Kingdom of the Netherlands to the debit side of the ledger of Belgium.
>
> "2. The principal transferred and the annuity bonds entered on the debit side of the ledger of Belgium in accordance with the preceding paragraph, up to a total of 8,400,000 Netherlands florins of annuity bonds, shall be considered as part of the Belgian national debt, and Belgium undertakes not to allow, either now or in future, any distinction to be made between this portion of its public debt resulting from its union with Holland and any other existing or future Belgian national debt." (*Ibid.*, pp. 897 and 898.)

Belgium had agreed to this provision (*ibid.*, pp. 914 and 915).

(*c*) The Treaty for the final separation of Belgium from Holland, signed at London by the five Courts and by Belgium on 15 November 1831 (*ibid.*, p. 645), used the wording of the provisions of the Forty-ninth Protocol reproduced above; but, this time as well, it was not accepted by Holland (see the Fifty-third Protocol of the London Conference, dated 4 January 1832 (annex A) (*ibid., 1831–1832* (London, Ridgway, 1834), vol. XIX, p. 57). [Translation by the Secretariat.]

5. Auditors appointed by each of the Parties shall meet within 15 days after the exchange of the ratifications of the present treaty, in the city of Utrecht, for the purpose of effecting the transfer of the principal and annuity bonds which, as a result of the apportionment of the public debts of the Kingdom of the Netherlands, are to become Belgium's liability, up to an amount of 5 million florins of annuities. The auditors shall also effect the extradition of any archives, maps, plans and documents belonging to Belgium or concerning its administration.[51]

48. The five Powers of the Holy Alliance, under whose auspices the 1839 Treaty was signed, guaranteed its provisions in two conventions of the same date signed by them and by Belgium and Holland. It was stated in those instruments that the articles of the Belgian-Dutch Treaty "are deemed to have the same force and value as they would have if they had been included textually in the present instrument and are consequently placed under the guarantee of Their Majesties".[52]

3. The dissolution of the union between Norway and Sweden (1905)[53]

49. The decision taken on 7 June 1905 by the Storting, the Norwegian Parliament, which took note of the fact that the royal power had "ceased to operate" as such for Norway, *ipso facto* terminated the union between Sweden and Norway formed by the Act of Union of 31 July and 6 August 1815. The union still had to be dissolved. This was done at the Swedish-Norwegian Conference, which met in late August 1905 at Karlstad to prepare several conventions, which were subsequently signed at Stockholm on 26 October 1905. The treatment of debts was decided by the Agreement dated 23 March 1906, relating to the settlement of economic questions arising in connexion with the dissolution of the union between Norway and Sweden,[54] which is commonly interpreted to mean that each State continued to be liable for its own debts.

50. Accordingly, Paul Fauchille has stated:

> After Sweden and Norway had dissolved their real union in 1905, a convention between the two countries, dated 23 March 1906, made each one of them responsible for its personal debts.[55]

A few years later, Alexandre N. Sack expressed a similar view, stating that "after the dissolution of their union in 1904, the two States continued to be liable for their respective debts, without any apportionment".[56]

51. These views are in keeping with the type of union formed by Sweden and Norway.[57] Whether the union is considered to a real or personal union, one can only say, as the Special Rapporteur has noted, that each member State of the union remained responsible for its own debts because "the debts of neither State devolved upon the union".[58] A union nevertheless presupposes a minimum of common institutions and, consequently, of common expenses to be defrayed. In the case of the union of Sweden and Norway, common institutions and dealings were limited to a single monarch and joint diplomacy.

52. In this respect, the Convention of 23 March 1906 contained the following provisions:

> *Art. 1.* Norway shall pay to Sweden the share applicable to the first half of 1905 of the appropriations voted by Norway out of the common budget for the foreign relations of Sweden and Norway in respect of that year, into the Cabinet Fund, and also, out of the appropriations voted by Norway for contingent and unforeseen expenditures of the Cabinet Fund for the same year, the share attributable to Norway of the cost-of-living allowances paid to the agents and officials of the Ministry of Foreign Relations for the first half of 1905.
>
> *Art. 2.* Norway shall pay to Sweden the share applicable to the period 1 January-31 October 1905 of the appropriations voted by Norway out of the common budget for that year, into the Consulates Fund, and also the share attributable to Norway of the following expenditures incurred in 1904 and not accounted for in the appropriations for that year:
>
> (*a*) The actual service expenditures of the consulates for the whole of 1904; and
>
> (*b*) The office expenses actually attributed to the remunerated consulates, subject to production of documentary evidence, for the second half of 1904.[59]

53. These provisions, the purpose of which was to make Norway assume its share of common budget expenditures, become clearer if it is remembered that, by a duplication of functions, the King of Sweden was, at the same time, the King of Norway and that Swedish institutions were exclusively responsible for the diplomatic and consular representation of the union. In this connexion, it should be noted that the pretext for or the cause of the break between the two States was Norway's wish to ensure its own foreign representation.

From the foregoing considerations, it may be inferred that the consequences of the dissolution of the Swedish-Norwegian union were, *first, the continued liability of each of the two States for its own debts and, secondly, an apportionment of the common debts between the two successor States.*

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[51] *Ibid., 1838–1839* (London, Harrison, 1956), vol. XXVII, p. 997. [Translation by the Secretariat.]

[52] Treaty made and signed in London on 19 April 1839, between Austria, France, Great Britain, Prussia and Russia, on the one part, and the Netherlands on the other, relative to the separation of Belgium and the Netherlands, art. 2 (*ibid.*, p. 992), and Treaty made and signed in London on 19 April 1839, between Austria, France, Great Britain, Prussia and Russia, on the one part, and Belgium on the other, art. 1 (*ibid.*, p. 1001).

[53] See L. Jordan, *La séparation de la Suède et de la Norvège* (Paris, Pedone, 1906) (thesis); P. Fauchille, *Traité de droit international public* (8th edition of the *Manuel de droit international* by H. Bonfils) (Paris, Rousseau, 1922), vol. I, p. 234.

[54] Baron Descamps and L. Renault, *Recueil international des traités du XX^e siècle, année 1906,* (Paris, Rousseau, 1914) pp. 858–862.

[55] Fauchille, *op. cit.*, p. 389.

[56] A. N. Sack, *Les effets des transformations des Etats sur leurs dettes publiques et autres obligations financières* (Paris, Sirey, 1927), vol. I, p. 104, *in fine.*

[57] For conflicting descriptions of this union, see Fauchille, *op. cit.*, p. 234.

[58] *Yearbook ... 1977,* vol. II (Part One), p. 114, document A/CN.4/301 and Add.1, para. 432.

[59] Descamps and Renault, *op. cit.*, pp. 858–859. [Translation by the Secretariat.]

4. The break-up of the union between Denmark and Iceland (1944)

54. Article 1 of the "Danish Act on the constitutional position of Iceland in the monarchy", dated 2 January 1871, provided that "Iceland [was] an inseparable part of the Danish State, with special privileges".[60] One of these privileges was that, under article 2, "[Iceland] *will not be required to make any contribution to the general needs of the monarchy*".*[61] In addition, under article 5 of the Act in question, Denmark had an obligation to provide a large annual subsidy to Iceland, which was granted a certain amount of autonomy for the conduct of its own affairs.

55. After the First World War, the Act of 30 November 1918 establishing the Union between Denmark and Iceland stated, in article 1, that

> 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.[62]

That Act did not provide a very clear solution to the debt problem. Section III, article 11, of the Act nevertheless stated that "with regard to *the contribution of Iceland to the expenses incurred in connexion with the cases mentioned in this section*,* matters which have not been regulated in the foregoing articles shall be dealt with in an agreement between the two countries".[63] As the Special Rapporteur has noted, this indicates that "each State was to make its contribution to the common expenses".[64]

56. Upon the dissolution of the Union, in 1944, the question of the succession to debts remained unanswered, most probably because the question was not relevant. In any event, one writer has stated that "since the separation of the two countries in respect of finances took place in 1871, the final separation in 1944 could not have any financial consequences".[65]

5. The dissolution of the United Arab Republic (1960)

57. The United Arab Republic, which was formed by the Provisional Constitution of 5 March 1958, was dissolved some two and one half years later as a result of Syria's withdrawal. The dissolution of this ephemeral union does not seem to be particularly relevant to the problem of succession to the debts of the union. When the United Arab Republic was formed, it was already known that nothing very explicit had been said with regard to the possible succession of the union to the debts of the member States.[66] The same uncertainty accompanied the reverse process of dissolution. At the present stage in his documentary research, the Special Rapporteur has been unable to determine what solutions were found to the problem of the succession to the union's debts after its dissolution.

6. The dissolution of the Federation of Mali (1960)

58. The Federation of Mali, established by the Constitution of 17 January 1959, was to withstand only for a short time the forces which were then working for the "balkanization" of Africa and which, as early as 1960, destroyed what had been described as "a landmark in the creation of a large West African State".[67] In August 1960, the Federation was dissolved.

59. This explains why the International Law Commission expressed the view that "the facts concerning the dissolution of that extremely ephemeral federation are thought to be too special for it to constitute a precedent from which to derive any general rule".[68] That comment would have been fully as relevant to the problem of debts if the Federation had had to deal with that problem. The Special Rapporteur has not, however, been able to form a definite opinion. All he can report is that on 11 July 1964 a communiqué issued after the meeting of the Joint Senegalese-Malian Commission announced that "Mali would gradually pay its debts to Senegal",[69] no further details are available.

7. The dissolution of the Federation of Rhodesia and Nyasaland (1963)

60. The Federation of which Northern Rhodesia, Southern Rhodesia and Nyasaland had been members since 1953 was dissolved in 1963 by an Order in Council of the British Government. The Order also apportioned the federal debt among the three territories in the following proportions: Southern Rhodesia 52 per cent, Northern Rhodesia 37 per cent and Nyasaland 11 per cent. The apportionment was made on the basis of the share of the federal income allocated to each territory.[70] This apportionment of the debts, as operated by the British Government's Order in Council, was challenged as to both its principle and its procedure.

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[60] F.-R. Dareste and P. Dareste, *Les Constitutions modernes*, vol. II, 3rd ed. (Paris, Challamel, 1910), p. 24 [Translation by the Secretariat.]

[61] *Ibid.*

[62] Dareste and Dareste, *op. cit., Europe*, vol. I, 4th ed., wholly revised (Paris, Sirey, 1928), p. 413.

[63] *Ibid.*, p. 414.

[64] *Yearbook ... 1977*, vol. II (Part. One), p. 114, document A/CN.4/301 and Add.1, para. 435.

[65] I. Paenson, *Les conséquences financières de la succession d'Etats* (Paris, Domat-Montchrestien, 1954), p. 63.

[66] See *Yearbook ... 1977*, vol. II (Part One), p. 116, document A/CN.4/301 and Add.1, para. 448.

[67] P.-F. Gonidec, *Constitutions des Etats de la Communauté* (Paris, Sirey, 1959), p. 73.

[68] *Yearbook ... 1972*, vol. II, p. 294, document A/8710/Rev.1, chap. II, sect. C, art. 27, para. 11 of the commentary.

[69] F. Moussu, "Chronologie des faits internationaux d'ordre juridique", *Annuaire français de droit international, 1964* (Paris, 1965), vol. X, p. 1000.

[70] O'Connell, *op. cit.*, p. 393.

61. It was first pointed out that "Since the dissolution was an exercise of Britain's sovereign power, Britain should assume responsibility."[71] This observation was all the more pertinent as the debts thus apportioned among the successor States by a British act of authority included debts contracted, under the administering Power's guarantee, with IBRD. This explains the statement by Northern Rhodesia that "it had at no time agreed to the allocation laid down in the Order and had only reluctantly acquiesced in the settlement."[72] O'Connell indicates that Zambia, formerly Northern Rhodesia, later dropped its claim, because of the aid granted to it by the United Kingdom Government.[73]

B. Comments and conclusions concerning the practice of States

62. Two conclusions which may be drawn from these cases of succession of States in respect of debts would merit consideration by the Commission in its work of codifying and progressively developing this highly complex subject. The first conclusion concerns the nature of the problems which arise in connexion with the succession of States in respect of debts. The second relates to the classification of the type of State succession exemplified by the precedents cited, and particularly the Belgian-Dutch case.

1. The nature of the problems

63. The attempt to resolve the problems of the devolution of State debts amounts, in the final analysis, especially in the case of the dissolution of a State, to seeking to adjust the interests of the States involved. These interests are often substantial and almost always conflicting and, in many cases, their reconciliation will call for difficult negotiations between the States directly affected by State succession. Only these States really know what are their own interests; they are often the best qualified to defend those interests and, in any event, they alone know how far they can go in making concessions.

64. These considerations are most strikingly illustrated by the case of the dissolution of the Belgian-Dutch State, where the two successor States refused to submit to the many settlement proposals made by third States, which happened to be the major Powers at that time. The eventual solution was worked out by the States concerned themselves, although a certain kinship is discernible between the various types of settlement proposed to them and the solutions they ultimately adopted. While it is undeniably more than desirable – indeed necessary – to leave the parties involved the amplest latitude in seeking an agreement acceptable to each of them, nevertheless this "face-to-face" confrontation might, in some situations, prove prejudicial to the interests of the weakest party.

65. It is appropriate, therefore, in order to minimize, if not to avoid, a clash of interests, to suggest certain principles for the guidance of the parties. Where successor States with divergent interests are involved, *equity* can and should have a prominent place in the settlement. This becomes eminently clear from the various Protocols of the London Conference relating to the separation of Belgium and Holland. In particular, the Forty-eighth Protocol of 6 October 1831[74] makes several references to *the concept of equity as the guiding principle in the apportionment of debts between the two successor States*, and states expressly that "the Conference considered the procedure to be followed in order to achieve an *equitable apportionment** of the debts and liabilities ... between Holland and Belgium".[75]

66. In the course of its deliberations, the London Conference found it "more just" to base the apportionment of the debts on the criterion of population size or of the taxes paid by the population. It considered it "*equitable** that the debts contracted during the union by the Kingdom of the Netherlands should be shared [between the two successor States] in equal halves."[76] A sum of 5 million Netherlands florins, corresponding to this equal share, was ultimately held to be payable by Belgium under the Treaty of 19 April 1839, which sealed the agreement between the two parties. Thus the two States did in fact share the debts "on a basis of strict equality (half shares)."[77]

67. In the same Forty-eighth Protocol, the Conference also stressed that it intended to take account of the "rules of equity" in seeking a solution, but it did not succeed anywhere in giving a definition of these rules, which is not surprising, for the meaning of equity has to be construed above all in the context of specific cases and particular situations. One writer aptly describes this concept as "*the achievement of justice in a particular instance*".[78] The attempt to codify the rules of equity certainly seems to be, if not an impossible exercise, at least an unprofitable one. The States affected by a State succession should have full latitude to work out the solution which in their view best reflects what they understand by equity, having regard to the circumstances of time and place and to the conditions characterizing the particular case.

[71] *Ibid.*, p. 394.

[72] *Ibid.*, p. 393.

[73] *Ibid.*, foot-note 6.

[74] *British and Foreign State Papers, 1838–1839* (London, Harrison, 1856), vol. XXVII, pp. 887–890.

[75] *Ibid.*, p. 888. [Translation by the Secretariat.]

[76] *Ibid.*, p. 889.

[77] Rousseau, *op. cit.*, p. 464.

[78] A. Decencière-Ferrandière, "Quelques réflexions touchant le règlement des conflits internationaux", *Mélanges A. Decencière-Ferrandière* (Paris, Pedone, 1940), p. 107.

2. Problems of classification of certain cases of succession of States

68. A particular instance of succession cannot always be categorized strictly as the result of a "secession-type of separation" or as the result of "the dissolution of a State". In its 1972 draft provisional articles on the succession of States in the matter of treaties, the Commission drew a sharp distinction between separation, or secession, and the dissolution of a State.[79] After this approach had been challenged by a number of States in their comments on the draft,[80] and by certain representatives in the Sixth Committee at the twenty-eighth session of the General Assembly, the Commission, subsequently, in its 1974 draft articles on the succession of States, slightly modified the treatment of these two cases. While maintaining the theoretical distinction between the dissolution of a State and the separation of the parts of a State, it dealt with the two cases simultaneously in a single article from the standpoint of the successor States (art. 33), and dealt in another provision with the case of the separation of parts of a State viewed from the standpoint of the predecessor State, where the latter continues to exist (art. 34).[81] In the case of succession to State property, the Commission considered that the distinction between succession and dissolution should be maintained, in view of the special characteristics of succession in that field. It devoted two separate articles to the two types of succession, but provided a joint commentary on both.[82]

69. In choosing from history examples reflecting the practice of States and in classifying them into those of the separation/secession type and those of the dissolution type, the Special Rapporteur took mainly into account the fact that, in a case of the first type, the predecessor State survives the transfer of territory, whereas in a case of the second type it ceases to exist. In the first case, the problem of the apportionment of debts arises between a predecessor State and one or more successor States, whereas in the second case it affects successor States *inter se*. Yet, even this apparently very dependable criterion of the State's disappearance or survival cannot ultimately be altogether relied upon for sure guidance, for it raises, in particular, the thorny problems of the State's continuity and identity.

70. In the case of the disappearance of the Kingdom of the Netherlands in 1830, which the Special Rapporteur has considered, not without some hesitation, under the heading "Dissolution of the State", rather than under that of separation, the predecessor State, the Belgian-Dutch monarchical entity, seems genuinely to have disappeared and to have been replaced by two new successor States, Belgium and Holland, each of which assumed responsibility for half of the debts of the predecessor State. In a way, it was actually the mode of settlement of the apportionment of the debts that confirmed the nature of the event which occurred in the Dutch monarchy and made it possible to describe it as "the dissolution of a State". It was possible to regard the Netherlands example from another point of view – to treat it as a case of secession – and to hold, like Feilchenfeld, that "from a legal point of view, the independence of Belgium was nothing more than a secession of a province".[83] To have so treated it might have proved seriously prejudicial to Holland's interests if that view had been acted upon, precisely in so far as it was not apparently demonstrated that the secessionist province was legally bound to participate – let alone in equal proportion – in the servicing of the debt of the dismembered State.

71. This viewpoint was not, in fact adopted by the London Conference or even by the parties themselves, least of all by Belgium. Both States regarded their separation as the *dissolution of a union*, and each claimed for itself the title of successor State to a predecessor State that had ceased to exist. This is the treatment adopted in the above-mentioned Treaty of London of 19 April 1839 concluded between the five Powers and the Netherlands, article 3 of which provided that "*The union** which existed between Holland and Belgium under the Treaty of Vienna of 31 May 1815 is recognized by His Majesty the King of the Netherlands, Grand Duke of Luxembourg, as being *dissolved*".[84]

72. It should be noted, however, that in this particular case its proposed classification as one of "dissolution of a union" might run into a possible difficulty, in that, at the time of their union, neither Holland nor Belgium constituted States. Holland had lost that status upon its annexation by France at the time of the Revolution, and Belgium had not yet attained international sovereignty. Possibly for the sake of convenience and to make it easier to work out a solution, the separation of Belgium and Holland came to be classified as a case of dissolution of a union. Still, there is no doubt that the Congress of Vienna of 1815, which brought the Napoleonic era to an end, had meant to restore to the Netherlands its former statehood, before uniting that country with Belgium.

In any event, the material point, which is also valid for the other examples considered in this report under the heading of the practice of States, is that dissolution carries with it the disappearance of the predecessor State, which is totally dismembered as a result, whereas upon the separation of one or more parts of

[79] See *Yearbook ... 1972*, vol. II, pp. 292 and 295, document A/8710/Rev.1, chap. II, sect. C, art. 27 and 28.

[80] See *Yearbook ... 1974*, vol. II (Part One), pp. 68–71, document A/CN.4/278 and Add.1–6, sect. III, art. 27.

[81] *Ibid.*, pp. 260 *et seq.*, document A/9610/Rev.1, chap. II, sect. D, art. 33 and 34.

[82] *Yearbook ... 1976*, vol. II (Part Two), p. 128, document A/31/10, chap. IV, sect. B.2, art. 15 and 16.

[83] Feilchenfeld, *op. cit.*, p. 208.

[84] *British and Foreign State Papers, 1838–1839* (London, Harrison, 1856), vol. XXVII, p. 993. [Translation by the Secretariat.]

a State's territory the predecessor State can survive. This is the decisive point in the classifications made, not without some hesitation, by the Special Rapporteur. This last remark shows, moreover, beyond question that there is a kinship of situations which calls, if not for like solutions, at least for analogous solutions as regards the apportionment of debts in the cases of separation and of dissolution.

C. Solutions proposed

73. Fauchille suggests the following rule:

If a State ceases to exist by breaking up and dividing into several new States, each of the latter shall in *equitable proportion** assume responsibility for a share of the debts of the original State as a whole, and each of them shall also assume exclusive responsibility for the debts contracted in the exclusive interest of its territory.[85]

74. A comparable formula is offered by Bluntschli, article 49 of whose codification of international law provides that:

If a State should divide into two or more new States, none of which is to be considered as the continuation of the former State, that former State is deemed to have ceased to exist and the new States replace it with the status of new persons.[86]

Bluntschli too recommends the equitable apportionment of the debts of the extinct predecessor State and cites as an example "the division of the Netherlands into two kingdoms, Holland and Belgium", though he considers that the former Netherlands was in a way continued by Holland "particularly as regards the colonies".[87]

75. Logically, in the apportionment of debts, which should always be governed by the principle of equity, a distinction should be drawn between the dissolution of a union and the dissolution of a unitary State. In practice, many a union between two States has often seemed to be reminiscent of a union of two persons who elect, in their marriage contract, to apply what is known in French civil law as *le régime de la communauté réduite aux acquêts*" (régime of the community to which only acquests accrue). In such a case, each of the two spouses retains the assets he or she possessed before the marriage and is alone answerable for his or her pre-existing debts. The two spouses are responsible for and share only those common debts which they contracted during their union. In the event of divorce, what happens in effect is a restoration of the *status quo ante*, combined with an apportionment of the debts contracted in common during the marriage.

In the case of the dissolution of a unitary State, i.e. in the event of a total dismemberment of that State, which thereby ceases to exist, what is to be apportioned is the totality of the debts of the extinct State. One cannot speak of a *status quo ante*, for there is no such *status*. However, in order not to have to make the distinction in a draft rule, it is sufficient to bear in mind that the only issue under consideration in the present context is that concerning the State debts of the predecessor State, as distinct from the individual debts of each territory (or of each State) composing the predecessor State. The dissolution of the union or unitary State affects only the treatment of the common State debts for which the predecessor State was until then responsible.

76. The difference between the case of separation and that of the dissolution of a State should not be ignored. In the former case, the predecessor State survives and may still answer for its debts, particularly if the seceding State coming into being by non-pacific means through the separation of one part of the predecessor State's territory rejects any agreement concerning the apportionment of the debts. In the latter case, that of the dissolution of a State, the totally dismembered State disappears, and this circumstance appears to acquire considerable importance in this subject of State debts, for the creditors have to know what will be the treatment of their claims in the event of the total disappearance of the predecessor State. In that situation, the various successor States coming into existence in consequence of the dissolution of the predecessor State can act only by agreement and generally manage to apportion in this way the State debt of the extinct predecessor State. This is why it would seem, in the light of State practice, that agreement should be the keystone of the rule to be drawn up.

77. Accordingly, the Commission might wish to consider, as part of the rules to be prepared regarding this topic, a draft article on the following lines:

Article 25. Dissolution of a State

Where a State is dissolved and disappears and the parts of its territory form two or more States, the apportionment of the State debts of the predecessor State shall be settled by agreement between the successor States.

In the absence of agreement, responsibility for the State debts of the predecessor State shall be assumed by each successor State in an equitable proportion, taking into account such factors as its tax-paying capacity and the property, rights and interests passing to it in connexion with the said State debts.

[85] Fauchille, *op. cit.*, p. 380.

[86] J. G. Bluntschli, *Le droit international codifié*, 5th ed. (Paris, Alcan, 1895), p. 82.

[87] *Ibid.*