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**A/CN.4/322 and Corr.1 & Add.1 & 2**

**Eleventh report on succession of States in respect of matters other than treaties, by Mr. Mohamed Bedjaoui, Special Rapporteur - draft articles on succession in respect of State archives, with commentaries**

Topic:  
**Succession of States in respect of matters other than treaties**

Extract from the Yearbook of the International Law Commission:-  
**1979, vol. II(1)**

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# SUCCESSION OF STATES IN RESPECT OF MATTERS OTHER THAN TREATIES

[Agenda item 3]

DOCUMENT A/CN.4/322 AND ADD.1 AND 2\*

**Eleventh 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 archives, with commentaries*

[Original: French]  
[18, 29 and 31 May 1979]

## CONTENTS

	<i>Page</i>	
<i>Abbreviation</i> . . . . .	68	
<i>Explanatory note: italics in quotations</i> . . . . .	68	
Introduction . . . . .	1-5	68
<i>Chapter</i>		
I. STATE ARCHIVES IN MODERN INTERNATIONAL RELATIONS AND IN THE SUCCESSION OF STATES . . . . .	6-91	71
A. Definition of archives affected by the succession of States . . . . .	6-24	71
1. Content of the concept of archives . . . . .	8-19	72
2. Definition of archives in the light of State practice in the matter of succession of States . . . . .	20-24	74
B. The role of archives in the modern world . . . . .	25-39	75
1. The "paper war" . . . . .	25-32	75
2. The age of information . . . . .	33-39	77
C. The claim to archives and the protection of the national cultural heritage . . . . .	40-56	78
1. Action by UNESCO . . . . .	41-53	78
(a) Action taken by UNESCO with a view to the restitution of archives . . . . .	42-43	78
(b) Action taken by UNESCO for the restitution of archives as part of the reconstitution and protection of the national cultural heritage . . . . .	44-45	79
(c) The right to a collective "cultural memory" . . . . .	46-53	80
(i) A new international cultural order . . . . .	46-48	80
(ii) The "four principles of Palermo" . . . . .	49-53	80
2. Action by the United Nations . . . . .	54	81
3. Action by the Conferences of non-aligned countries . . . . .	55-56	81
D. History of the disputes concerning archives in the context of the succession of States . . . . .	57-58	82
Non-exhaustive table of treaties containing provisions relating to the transfer of archives in cases of succession of States . . . . .		82
E. General principles respecting succession to State archives . . . . .	59-91	93
1. General remarks on the practice followed by States: conclusions drawn from the study of the foregoing table. . . . .	60-63	93
2. General principles concerning succession to State archives . . . . .	64-83	94
(a) Restitution and co-operation . . . . .	64-67	94
(b) Demythification of the problems concerning disputes over archives . . . . .	68-70	95
(c) Obligation to negotiate and to settle disputes concerning archives . . . . .	71-72	96
(d) Transfer of originals pursuant to the principle of the territorial origin of archives . . . . .	73-75	96
(e) Transfer of originals pursuant to the principle of functional connection of archives . . . . .	76-77	96
(f) Concept of archives as a common heritage . . . . .	78	97
(g) Principle of the territoriality of archives . . . . .	79-80	97
(h) Subsidiary principles: right to a substitute copy and right to reparation . . . . .	81-83	97
(i) Right to a substitute copy . . . . .	81	97
(ii) Right to reparation through delivery of documents of equivalent value . . . . .	82-83	98

\* Incorporating document A/CN.4/322/Corr.1.

<i>Chapter</i>	<i>Paragraphs</i>	<i>Page</i>
3. Proposals for a draft article	84-91	98
<i>Article A. Transfer of State archives</i>	89	99
<b>II. PROVISIONS PECULIAR TO EACH TYPE OF SUCCESSION OF STATES WITH REGARD TO STATE ARCHIVES</b>	92-209	100
<b>A. Transfer of part of a State's territory</b>	92-140	100
1. Transfer to the successor State of all archives relating or belonging to the transferred territory	93-104	100
(a) Sources	93	100
(b) Archives as evidence	94	100
(c) Archives as instruments of administration	95-101	100
(i) Case of a single successor State	96-98	100
(ii) Case of more than one successor State	99-101	101
(d) Archives: historical fund or cultural heritage	102-104	101
2. Archives removed from or constituted outside the transferred territory	105-121	101
(a) Archives which have been removed	110-118	102
(b) Archives established outside the territory	119-121	104
3. The "archives-territory" link	122-127	105
4. Special obligations of the successor State	128-130	105
5. Time-limits for handing over the archives	131	106
6. State libraries	132	106
7. Conclusions to be drawn from the practice of States and proposals for a draft article	133-140	106
<i>Article B. Transfer of a part of the territory of one State to another State</i>	140	108
<b>B. Newly independent States</b>	141-181	108
1. Historical background and new problems	141-146	108
2. Political archives of the colonial period	147-161	110
3. Pre-colonial historical archives and cultural archives proper to the territory	162-172	112
4. Archives established outside the territory which has become independent	173	114
5. Administrative archives	174-179	114
6. Proposals for a draft article	180-181	116
<i>Article C. Newly independent States</i>	181	117
<b>C. Uniting of States</b>	182-189	118
<i>Article D. Uniting of States</i>	189	119
<b>D. Separation of part or parts of the territory of a State and dissolution of a State</b>	190-209	119
<i>Article E. Separation of part or parts of the territory of a State</i>	204	122
<i>Article F. Dissolution of a State</i>	206	123
<b>SHORT BIBLIOGRAPHY</b>		123

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#### ABBREVIATION

UNESCO      United Nations Educational, Scientific and Cultural Organization

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#### EXPLANATORY NOTE: ITALICS IN QUOTATIONS

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

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### Introduction

1. In the period from 1968 to 1978, the Special Rapporteur submitted ten reports on the problems arising in connection with the succession of States in respect of matters other than treaties. Because of the vastness of the subject, which touches on succession to public property, public debts, the legislation and internal law of the predecessor State, the legal status of the inhabitants (in particular, their nationality), territorial problems, acquired rights and other matters, as long ago as 1968 the International Law Commission decided, on the Special Rapporteur's suggestion, that its researches should be limited to the topic *succession of States in economic and financial matters*, "on the

understanding that this did not in any way imply that all the other questions coming under the same heading would not be considered later".<sup>1</sup>

2. As the Special Rapporteur and the Commission advanced in their research, they discovered that there was an abundance of material relating to the subject, but they also realized how complex and difficult it was, with the consequence that, even if limited to "succession of States in economic and financial matters", it was found to be still too broad for a first stage of codification. Even in confining his study to public

<sup>1</sup> *Yearbook . . . 1968*, vol. II, p. 221, document A/7209/Rev.1, para. 78.

property and public debts in the context of State succession in economic and financial matters, the Special Rapporteur ran the risk of straying into the study of three categories of public property and public debts: property and debts of the State, property and debts of territorial authorities other than States, and property and debts of public enterprises or public bodies—quite apart from the property and debts of the territory affected by the State succession. For this reason the Commission decided in 1973, at its twenty-fifth session, after full discussion and on the proposal of the Special Rapporteur, that for the time being the study should be confined to one only of the three categories of public property and public debts—the category concerning the State.<sup>2</sup>

3. By the end of its thirtieth session, in 1978, and after having considered the subject for several years, the Commission had adopted a series of draft articles on succession to State property and State debts, the text of which is reproduced below.

TEXT OF ALL THE DRAFT ARTICLES ADOPTED SO FAR  
BY THE COMMISSION (ARTICLES 1 TO 25)

INTRODUCTION

*Article 1. Scope of the present articles*

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

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

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

*Article 3. Use of terms*

For the purposes of the present articles:

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

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

(c) “successor State” means the State which has replaced another State on the occurrence of a succession of States;

(d) “date of the succession of States” means the date upon which the successor State replaced the predecessor State in the responsibility for the international relations of the territory to which the succession of States relates;

(e) “third State” means any State other than the predecessor State or successor State;

(f) “newly independent State” means a successor State the territory of which, immediately before the date of the succession of States, was a dependent territory for the international relations of which the predecessor State was responsible.

<sup>2</sup> *Yearbook . . . 1973*, vol. II, p. 202, document A/9010/Rev.1, para. 87.

PART I

SUCCESSION OF STATES TO STATE PROPERTY

SECTION 1. GENERAL PROVISIONS

*Article 4. Scope of the articles in the present Part*

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

*Article 5. State property*

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

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

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

*Article 7. Date of the passing of State property*

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

*Article 8. Passing of State property without compensation*

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

*Article 9. General principle of the passing of State property*

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

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

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

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

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

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

*Article 12. 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 State property of the predecessor State to the successor State is to be settled by agreement between the predecessor and successor States.

\* Provisional designation.

2. In the absence of an agreement:

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

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

*Article 13. Newly independent States*

When the successor State is a newly independent State:

1. If immovable and movable property, having belonged to an independent State which existed in the territory before the territory became dependent, became State property of the administering State during the period of dependence, it shall pass to the newly independent State.

2. Immovable State property of the predecessor State situated in the territory to which the succession of States relates shall pass to the successor State.

3. (a) Movable State property of the predecessor State connected with the activity of the predecessor State in respect of the territory to which the succession of States relates shall pass to the successor State;

(b) Movable State property of the predecessor State other than the property mentioned in subparagraph (a), to the creation of which the dependent territory has contributed, shall pass to the successor State in proportion to the contribution of the dependent territory.

4. When a newly independent State is formed from two or more dependent territories, the passing of the State property of the predecessor States to the newly independent State shall be determined in accordance with the provisions of paragraphs 1 to 3.

5. When a dependent territory becomes part of the territory of a State other than the State which was responsible for its international relations, the passing of the State property of the predecessor State to the successor State shall be determined in accordance with the provisions of paragraphs 1 to 3.

6. Agreements concluded between the predecessor State and the newly independent State to determine succession to State property otherwise than by the application of the foregoing paragraphs shall not infringe the principle of the permanent sovereignty of every people over its wealth and natural resources.

*Article 14. Uniting of States*

[1. When two or more States unite and thus form a successor State, the State property of the predecessor States shall, subject to paragraph 2, pass to the successor State.

2. The allocation of the State property of the predecessor States as belonging to the successor State or, as the case may be, to its component parts shall be governed by the internal law of the successor State.]

*Article 15. Separation of part or parts of the territory of a State*

1. When a part or parts of the territory of a State separate from that State and form a State, and unless the predecessor State and the successor State otherwise agree:

(a) immovable State property of the predecessor State shall pass to the successor State in the territory of which it is situated;

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

(c) movable State property of the predecessor State, other than that mentioned in subparagraph (b), shall pass to the successor State in an equitable proportion.

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

3. Paragraphs 1 and 2 are without prejudice to any question of equitable compensation that may arise as a result of a succession of States.

*Article 16. Dissolution of a State*

1. When a predecessor State dissolves and disappears and the parts of its territory form two or more States, and unless the successor States concerned otherwise agree:

(a) immovable State property of the predecessor State shall pass to the successor State in the territory of which it is situated;

(b) immovable State property of the predecessor State situated outside its territory shall pass to one of the successor States, the other successor States being equitably compensated;

(c) movable State property of the predecessor State connected with the activity of the predecessor State in respect of the territories to which the succession of States relates shall pass to the successor State concerned;

(d) movable State property of the predecessor State other than that mentioned in subparagraph (c) shall pass to the successor States in an equitable proportion.

2. Paragraph 1 is without prejudice to any question of equitable compensation that may arise as a result of a succession of States.

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:

(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.

*Article 23. Uniting of States*

1. When two or more States unite and thus form a successor State, the State debt of the predecessor States shall pass to the successor State.

2. Without prejudice to the foregoing provision, the successor State may, in accordance with its internal law, attribute the whole or any part of the State debt of the predecessor States to its component parts.

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

1. When a part or parts of the territory of a State separate from that State and form a State, and unless the predecessor State and the successor State otherwise agree, an equitable proportion of the State debt of the predecessor State shall pass to the successor State, taking into account all relevant circumstances.

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

*Article 25. Dissolution of a State*

When a predecessor State dissolves and disappears and the parts of its territory form two or more States, and unless the successor States otherwise agree, an equitable proportion of the

State debt of the predecessor State shall pass to each successor State, taking into account all relevant circumstances.

4. However, when at its twenty-eighth session, in 1976, the Commission considered the Special Rapporteur's eighth report, some of its members expressed the strong hope that he would supplement his draft articles concerning State property, which were drafted in abstract terms, by some articles dealing with a special category of State property, specifically State archives. This wish was reflected in the Commission's report, which also mentioned that the Special Rapporteur was prepared to submit some articles on State archives<sup>3</sup> on account of the special importance of archives in the life of nations and of the prominence which disputes relating to archives had received in international relations. The present report is intended to be a response to this request.

5. This study consists of two chapters:

(a) Chapter I will deal with *State archives in modern international relations*, and will deal with the following topics: (i) a definition of archives affected by State succession; (ii) the role of archives in the modern world; (iii) claim to archives in the context of the protection of the cultural heritage of peoples; (iv) history of disputes concerning archives in the context of State succession; (v) general principles concerning succession to State archives.

(b) Chapter II will deal with the *problems of the transfer of State archives in each type of case of State succession* and will contain a draft article relating to each type of case.

<sup>3</sup> See *Yearbook ... 1976*, vol. II (Part Two), p. 126, document A/31/10, para. 103. In his statement to the Sixth Committee of the General Assembly, the Chairman of the Commission referred to this wish expressed by some of its members (*Official Records of the General Assembly, Thirty-first Session, Sixth Committee, 13th meeting, para. 44*; and *ibid., Sessional fascicle, corrigendum*). Some representatives on the Sixth Committee stated that they were "pleased to note that the Commission had commissioned a special study by the Special Rapporteur on the question of succession to archives" (statement by the representative of the United Kingdom: *ibid.*, 18th meeting, para. 39; and *ibid., Sessional fascicle, corrigendum*).

## CHAPTER I

### State archives in modern international relations and in the succession of States

#### A. Definition of archives affected by the succession of States

6. The Special Rapporteur does not intend, unless the Commission advises him otherwise, to devote a specific article to the definition of archives. He believes

that, in the draft articles under preparation, the definition of State property *in abstracto* applies perfectly to the case of archives as State property regarded *in concreto*. However, although there is no need for an article defining archives in the draft under consideration, it is important to bear in mind certain

elements which make it possible to determine *the concept of archives* and to know exactly what is covered by the subsequent proposed articles concerning the disposition of archives in the case of succession of States. The elements referred to below will give some idea of the complexity of the problem under consideration. The concept of archives and the frontiers of the archival science are not easy to determine, particularly in view of the overlapping of items in archives, museums, iconographic collections and libraries.

7. The data given below for the information of members of the Commission are for the most part taken from the excellent and erudite general report drawn up by Mr. Yves Pérotin for the Seventh International Round Table Conference on Archives, on the basis of the replies given by 33 States to a questionnaire.<sup>4</sup> Obviously the jurist and the archivist do not follow an identical approach. The following two points will be considered below:

- (a) content of the concept of archives;
- (b) definition of archives in the light of State practice in the matter of succession of States.

#### 1. CONTENT OF THE CONCEPT OF ARCHIVES

8. From the answers to the questionnaire drawn up by the International Conference of the Round Table on Archives it can be inferred that "archives" are generally taken to mean: "(a) *the documentary material amassed by institutions or natural or legal persons in the course of their activities, and deliberately preserved\**; (b) the institution which looks after this documentary material; (c) the premises which house it".<sup>5</sup> For the purpose of the present draft articles only the first limb of the definition is relevant, which regards archives as movable property; the reference to the custodial institution and to the premises will be disregarded at this point, for these are dealt with in the draft articles concerning immovable property. But this definition (which, *prima facie*, gives only a vague idea of the wealth of material it covers) concerns both public and private archives. Since these draft articles are concerned with succession to State property, the discussion which follows will relate only to "the documentary material constituted by State institutions in the course of their activities and deliberately preserved by them".

9. An *archival document* may be in written form or unwritten. The physical nature of the document is irrelevant. An archival document is anything which

contains "*authentic data which may serve scientific, official and practical purposes\**", according to the reply of Yugoslavia to the questionnaire drawn up by the International Round Table Conference on Archives.<sup>6</sup>

10. In his earlier reports,<sup>7</sup> the Special Rapporteur drew a distinction between *administrative* and other archives, particularly *historical* archives, not with a view to justifying a different treatment for each category, but to provide a list of examples of State policy with regard to the transfer of archives. Some experts in archival science however apply this distinction, observing that administrative archives serve administrative purposes, whereas archives as such are used for purposes of scholarship. However, the two categories are not completely water-tight, first, because historical archives are frequently no more than old administrative archives, and secondly, because administrations sometimes consult historical archives in their day-to-day business, and conversely scholarly research workers make greater use of current administrative archives whenever access to them is not forbidden by national legislation.

11. In any case, it is not easy to define archives, because there is no clear division between the categories of archival, library and museum items. The *criterion of writing* is not as clear-cut as might at first be supposed. Not all written material is necessarily part of the archives, and not all unwritten material must necessarily be excluded from archives. Of course, "the preservation of written sources" remains the very basis for the constitution of State archives, but the criterion of *the physical appearance of the object*, and even that of its origin, play a part in the definition of archival documents. Engravings, drawings and plans which include no writing may be archival items. The archivist attaches a single condition to their inclusion: they must be part of an archive file. Obviously, as far as the State is concerned they are archival documents. It is at the stage following their recovery by the State that the conditions of the archivist come into play in order to decide whether such items should be kept by an archive institution, a library, a museum, or simply by a body which deals with day-to-day administrative matters.

12. *Numismatic collections* are sometimes an integral part of an archival collection. Quite apart from historic collections of paper money, or samples or dies or specimens of bank notes or stamps, there are even collections of coins in national archival collections or national libraries. This is the case in Romania, Italy, Portugal, England (where the Public Record Office

<sup>4</sup> See France, Direction des archives de France, *Actes de la septième Conférence internationale de la Table ronde des archives, Le concept d'archives et les frontières de l'archivistique* (Paris, Imprimerie nationale, 1963), p. 7.

<sup>5</sup> *Ibid.*, p. 9.

<sup>6</sup> *Ibid.*, p. 10.

<sup>7</sup> Cf. particularly *Yearbook . . . 1970*, vol. II, p. 131, document A/CN.4/226; *Yearbook . . . 1974*, vol. II (Part One), p. 91, document A/CN.4/282; *Yearbook . . . 1976*, vol. II (Part One), p. 55, document A/CN.4/292.

owns a collection of stamps and counterfeit coins) and in France (where the Bibliothèque nationale in Paris houses a large numismatic collection from the Cabinet des médailles).

13. *Iconographic documents*, which are normally kept in museums, are sometimes kept in national archival institutions, most frequently because they belong to archival collections. Iconographic documents which have to do with important persons or political events are filed and cared for as part of the national archives. This is the case in England, where the Public Record Office has a large collection of iconographic documents as well as a large series of technical drawings from the Patent Office; in Italy, where the Archivio centrale dello Stato keeps photographs of all political, scientific, and ecclesiastical notables; and in Argentina, where the Archivo gráfico fulfils the same function.

14. In Romania, all documents on parchment, paper, glass or film form an integral part of the archives, in accordance with precise rules based on their physical form, and they are kept and looked after in the national archival institutions. The difficulty in drawing a distinction between what forms part of the archives and what has to do with iconographic documents in museums and libraries becomes clear from an analysis of certain national legislation, such as the Czechoslovak interministerial decision of 25 February 1959, or the Hungarian Decree-Law No. 29 of 30 July 1950, both of which attempt, with difficulty, to establish criteria for the allocation of such items.

15. *Photographic prints* are part of the archives themselves in certain countries. Thus, in Poland the national archives receive prints from State photographic agencies. Under Argentine legislation, "drawings, paintings and photographs which concern aspects of the country or its personalities" are considered to be "historic documents", and should therefore be part of the national archival collection, although the Special Rapporteur is not certain that this is the case.

16. Some *sound documents* and *cinematographic films* are considered to be "archives" under the law of many countries (for example, Czechoslovakia, France, Sweden) and are therefore allocated under certain conditions either to the State archival administration or to libraries or museums or to other institutions. In cases where they are allocated to the State archival administration, sound documents must be considered an integral part of the archives and must be treated in the same way as the latter in the case of succession of States. In the United States of America, commercial films are subject to copyright and are registered with the Library of Congress, whereas cinematographic productions by the army and certain American public institutions are placed in the State archives. In Finland, a committee chaired by the director of the national

archives is responsible for the establishment and preservation of cinematographic archives.<sup>8</sup>

17. Should *archives* and *libraries* be treated on the same footing? Since his third report,<sup>9</sup> the Special Rapporteur has dealt simultaneously with the problems of archives and libraries, offering the same solution for both. There can be no insurmountable difference in nature between an archival collection and a library collection. While archives are generally thought of as "documents forming part of an organic whole", whereas libraries are composed of works considered to be "isolated or individual units", it is nevertheless true that the distinction is not absolute, which means that archival documents are frequently received in libraries and conversely library items are sometimes taken into the archives. The inclusion of library documents in the archives is not limited only to rare or out-of-print books, which may be said to be "isolated units", or to manuscripts, which by their nature are "isolated units". Conversely, libraries acquire or receive as gifts or legacies the archives of important persons or statesmen. There are therefore certain areas in which archives and libraries overlap, and these are extended by the system of the statutory deposit of copies of printed works (including the press) in certain countries, and by the fact that the archival administration sometimes acts as the author or publisher of official publications.

18. Similarly, *archives* and *museums* cannot be placed in completely separate categories: some collections of archives are housed in museums, and various museum pieces are found in archives. Mr. Pérotin states in his report that:

... in England, it is considered normal that archival documents connected with museographical collections should follow the latter and, conversely, that certain objects (such as chests) should be treated in the same way as papers; ... local museums own archival documents that have been bought, or received as gifts, or come from learned societies ... In the Netherlands, historical atlases are cited as an example of documents legitimately kept in museums, while dies of seals are kept in the archives. In the state of Westphalia, reference is made to chests and other objects which by their nature belong to the archives ... In the USSR, collections of manuscript documents provisionally kept in the national museums are supervised by the Archives; the major autonomous "archive museums", established by special decision (Gorky, Mendeleev, etc.), are not exempt ...

... In Portugal, ... the Viseu regional museum keeps some of the parchments from the cathedral chapter of the See, and the remainder are in the district archives or in Lisbon in the Torre do Tombo. ... In Turkey, ... the archives of the palace of the former sultans are kept in the Topkapi-Sayari museum with part of the records of the religious tribunals, whereas the provincial counterparts of those records are, in exactly nineteen cases, kept in museums.<sup>10</sup>

19. The meaning of "archives" becomes even clearer, and the abundance of the material it covers in many countries becomes more evident, if it is remembered

<sup>8</sup> For other examples, see France, *Le concept d'archives* ... (op. cit.), pp. 30-31.

<sup>9</sup> *Yearbook* ... 1970, vol. II, p. 131, document A/CN.4/226.

<sup>10</sup> France, *Le concept d'archives* ... (op. cit.), pp. 45-46.



that *objects seized by the police or customs authorities and exhibits related to criminal proceedings* are sometimes part of the archives, or are divided between criminological museums and national archives. In the United States of America, the judicial authorities decide whether such exhibits should be placed in the archives. In many States, *models, drawings, prototypes, scale models and samples* are sometimes placed in the national archives, as are certain *official gifts* offered to the head of State. In the United States, since Roosevelt's time, the "presidential libraries", which belong to the national archives, keep such gifts.

## 2. DEFINITION OF ARCHIVES IN THE LIGHT OF STATE PRACTICE IN THE MATTER OF SUCCESSION OF STATES

20. The range of the items which are transferable in the event of a succession of States should be taken in the broadest sense, unless the predecessor and successor States have expressly agreed otherwise. It should cover "archives and State documents of every kind". The successor State is bound by the meaning attached by the predecessor State to the term "State archives" in conformity with its own legislation in force at the time of the succession of States, if the treaty governing the devolution of the archives concerning the territory transferred has not defined the content and nature of those archives differently. It is the domestic law in force in the predecessor State which indicates what was meant by "State archives", namely, written, sound, photographic or graphic material and, secondly, objects of all kinds accompanying these documents as "archives by reason of their purpose". The problem raised by the Special Rapporteur is not at this stage whether all State archives belonging to the predecessor State are transferred to the successor State. That is not the question. The problem at the present stage is merely what can be understood by "State archives". The problem of the *link between State archives and the territory* involved in the succession of States will be discussed subsequently, with a view to determining the categories of State archives liable to be transferred to the successor State. The "archives-territory" link will be considered in the context of the archives belonging to or concerning the territory.

21. The expression "archives of every kind" covers the ownership, type, character, category and nature of the items and documents, and suggests all the wealth of material mentioned in paragraphs 9 to 19 above, by reference to the domestic law of the predecessor State. The expression "State archives of every kind" refers in the first place to *ownership*, in other words archives of every kind belonging to the predecessor State. It also refers to the type of archives, whether diplomatic, political or administrative, military, civil or ecclesiastical, historical or geographical, legislative, regulatory or judicial, financial, fiscal or cadastral, etc.

The character of these items is likewise immaterial (whether they are secret or accessible to the public).

22. The question of the *nature* or *category* of the archives relates not only to the fact that they may consist of written material, whether in manuscript or in print, or of photographs, graphic material, and so forth, or that they may be originals or copies, but also to the substance of which they are made, such as paper, parchment, fabric, leather, etc. Lastly, "archives of every kind" should be understood to mean all *varieties* of documents. It seemed to the Special Rapporteur unnecessary and pointless to enumerate all these varieties in a list which would necessarily be incomplete and would certainly be tedious. Examples of the wordings used in diplomatic instruments are "archives, registers, plans, title-deeds and documents of every kind";<sup>11</sup> "archives, documents and registers concerning the civil, military and judicial administration of the ceded territories";<sup>12</sup> "all title-deeds, plans, cadastral and other registers, and papers";<sup>13</sup> "any government archives, records, papers or documents which relate to the cession or the rights and property of the inhabitants of the islands ceded";<sup>14</sup> "archives and objects of historical value";<sup>15</sup> "all archives having a general historic interest", as opposed to "archives which are of interest to the local administration";<sup>16</sup> "all documents exclusively referring

<sup>11</sup> This expression appears in several clauses of the Treaty of Versailles of 28 June 1919: part III, sect. I, art. 38, concerning Germany and Belgium; sect. V, art. 52, concerning Germany and France in respect of Alsace-Lorraine; sect. VIII, art. 158, concerning Germany and Japan in respect of Shantung (*British and Foreign State Papers* (London, H.M. Stationery Office, 1922), vol. 112, pp. 29-30, 42 and 81); as well as in the Treaty of Saint-Germain-en-Laye of 10 September 1919: art. 93, concerning Austria (*ibid.*, p. 361); and in the Treaty of Trianon of 4 June 1920: art. 77, concerning Hungary (*ibid.*, vol. 113, p. 518).

<sup>12</sup> Art. 3 of the Treaty of Peace between the German Empire and France signed at Frankfurt on 10 May 1871 (G. F. de Martens, ed., *Nouveau Recueil général de traités* (Göttingen, Dieterich, 1874), vol. XIX, p. 689).

<sup>13</sup> Art. 8 of the Additional Agreement of the Treaty of Peace signed at Frankfurt on 11 December 1871 (*ibid.*, 1875), vol. XX, p. 854).

<sup>14</sup> Art. 1, para. 3, of the Convention between the United States of America and Denmark providing for the cession of the Danish West Indies, signed at New York on 4 August 1916 (*Supplement to the American Journal of International Law* (New York), vol. 11 (1917), p. 61).

<sup>15</sup> Art. 37 (concerning Ethiopia) of the Treaty of Peace with Italy, signed at Paris on 10 February 1947 (United Nations, *Treaty Series*, vol. 49, p. 142). On the basis of that article and article 75 (*ibid.*, p. 157), Ethiopia and Italy concluded an Agreement concerning the settlement of economic and financial matters issuing from the Treaty of Peace and economic collaboration, signed at Addis Ababa on 5 March 1956, which had three annexes, A, B and C, listing the archives and objects of historical value that had been or were to be returned to Ethiopia by Italy (*ibid.*, vol. 267, pp. 204-216).

<sup>16</sup> Art. VI of the Treaty of cession of the territory of the Free Town of Chandernagore between India and France, signed at Paris on 2 February 1951 (*ibid.*, vol. 203, pp. 158-160).

to the sovereignty relinquished or ceded . . . , the official archives and records, executive as well as judicial";<sup>17</sup> "documents, deeds and archives . . . , registers of births, marriages and deaths, land registers, cadastral papers . . .",<sup>18</sup> and so forth.

23. One of the most detailed definitions of the term "archives" that the Special Rapporteur has come across is the one in article 2 of the Agreement of 23 December 1950 between Italy and Yugoslavia,<sup>19</sup> concluded pursuant to the Treaty of Peace of 10 February 1947. It encompasses documents relating to all the public services, to the various parts of the population, and to categories of property, situations or private juridical relations. Article 2 reads as follows:

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

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

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

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

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

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

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

24. This definition of archives by indicative enumeration, rather than by uncertain application of indefinable criteria, has the advantage of giving an idea of the richness of the material of all kinds of an historical, cultural, administrative, technical or scientific nature which is covered by the notion of archives

<sup>17</sup> Art. VIII of the Treaty of Peace between Spain and the United States of America, signed at Paris on 10 December 1898 (English text in W.M. Malloy, ed., *Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and other Powers, 1776-1909* (Washington D.C., U.S. Government Printing Office, 1910), vol. II, p. 1693).

<sup>18</sup> Art. 8 of the Frontier Treaty between the Netherlands and the Federal Republic of Germany, signed on 8 April 1960 at the Hague (United Nations, *Treaty Series*, vol. 508, p. 154).

<sup>19</sup> Agreement, signed at Rome on 23 December 1950, between the Italian Republic and the Federal People's Republic of Yugoslavia with respect to the apportionment of archives and documents of an administrative character or of historical interest relating to the territories ceded under the terms of the Treaty of Peace (*Ibid.*, vol. 171, p. 291).

as seen by expert archivists, and as it is retained, in whole or in part, in one or more of its aspects, by States when a succession of States takes place. To what extent, and according to what criteria and modalities, the transfer of State archives is carried out in the case of a transfer of territory will become evident later on in this report. For the time being, this enumerative definition has the advantage of giving a broad idea of the importance and role of archives in modern international relations.

## B. The role of archives in the modern world

### 1. THE "PAPER WAR"

25. Archives, jealously preserved, are the essential instrument for the administration of a community, as has been seen above. They both record the management of State affairs and enable it to be carried on, while at the same time embodying the ins and outs of human history; consequently, they are of value to both the researcher and the administrator. Secret or public, they constitute a heritage and a public property which the State generally makes sure is inalienable and imprescriptible. Espionage is often nothing but a "paper war" which enables the more successful to obtain the enemy's—or even the ally's—plans, designs, documents, secret treaties, and so forth. According to a group of experts convened by UNESCO in March 1976,

Archives are an essential part of the heritage of any national community. Not only do they provide evidence of a country's historical, cultural and economic development and provide the foundation of the national identity, but they also constitute essential title deeds supporting the citizen's claim to his rights.<sup>20</sup>

26. The destructive hatchet and torch of the wars which have eternally afflicted mankind have seriously impaired the integrity of archival collections. In some cases, the importance of documents is such that the victor hastens to transfer these valuable sources of information to its own territory. Armed conflict may result not only in the occupation of a territory, but also in the spoliation of its records. All, or almost all, annexation treaties in Europe since the Middle Ages have required the conquered to restore the archives belonging to or concerning the ceded territory. Without being under any delusion as to the draconian practice of the victors who carried off archives and recklessly disrupted established collections, doctrine considered clauses for the handing over of archives to the annexing State as implicit in the few treaties from which they had been omitted.<sup>21</sup> These practices have

<sup>20</sup> UNESCO, "Final report of consultation group to prepare a report on the possibility of transferring documents from archives constituted within the territory of other countries" (CC-76/WS/9), p. 2. The meeting was held in co-operation with the International Council on Archives.

<sup>21</sup> L. Jacob, *La clause de livraison des archives publiques dans les traités d'annexion* [thesis] (Paris, Giard et Brière, 1915), *passim* and in particular pp. 44 and 49.

been followed in all periods and in all countries. The fact is that archives handed over to the successor State, forcibly if necessary, served primarily as *evidence* and as *title deeds* to the annexed territory and were used as instruments for the administration of the territory—and are so used even more nowadays. In addition to these “evidentiary” and administrative functions, they also sometimes served political purposes.

27. Charles Braibant and Robert-Henri Bautier have shown how archives have sometimes been used for political purposes, and not simply to establish the cultural heritage of a country. In their view, for example, Napoleon’s ideas on archives were entirely political; he never considered their historical value. His intention was to

use archives, including the collections brought to Paris from all parts of Europe on his orders, for very specific political purposes. Written instructions issued by him have been found, ordering documentary material to be assembled on the violations of the law of nations by England throughout history, as well as other instructions relating to the temporal rule of the Holy See.<sup>22</sup>

28. In 1808, Napoleon I ordered the acquisition of the Hôtel Soubise so that all the public archives scattered throughout Paris could be brought together in one place. One writer states that, as a result of this consolidation,

the Emperor, who was interested in archives and who was not satisfied with ordinary measures, had the grand idea of bringing the archives of Europe to Paris. He considered it logical, after having subjugated the territories, to gather together the instruments, papers and documents concerning their administration or history (letter from Napoleon to the Minister of the Interior, dated 15 February 1810, after his first visit to the Hôtel de Soubise) . . . As a result, most of the archives of the Vatican, Liguria, Piedmont, Savoy and Geneva (1809–1811) were transported to Paris between 1809 and 1813. A large proportion of the archives of Vienna (1809) and Spain (1812) were also brought to this repository, which was to be situated in a building with a storage capacity of 100,000 cubic metres, and the construction of which had begun on the left bank of the Seine between the Iena and Concorde bridges.<sup>23</sup>

<sup>22</sup> France, Direction des Archives, *Actes de la sixième Conférence internationale de la Table ronde des archives; Les archives dans la vie internationale* (Paris, Imprimerie nationale, 1963), p. 133.

<sup>23</sup> Jacob, *op. cit.*, pp. 60–61.

Mr. Jean Favier, the present director of Archives de France, states that:

“In 1810, General Kellerman began the shipment of the Spanish archives; of the 500 vehicles needed, only 30 left Simancas with material for the new Spanish section of the imperial archives. Daunou [the archivist of the Napoleonic Empire] himself sent 3,139 crates of documents from Vienna. Part of the archives of Piedmont, Florence, Pisa, Sienna, Parma and Piacenza reached the banks of the Seine. More than 35,000 cartons left Germany. The Vatican archives represented a choice prize, and it was Napoleon’s intention to use possession of them to bring pressure to bear on the Government of the Church. Daunou travelled to Rome and dispatched 450 vehicles containing 12,147 crates of archives . . . The restoration of these archives to their respective countries was a slow and difficult undertaking. Some remained in France; many disappeared in transit; a number of wagons never reached Rome, because of the hazards of the journey. The collections relating to the Netherlands, and coming from Vienna, were

29. However, these remarks should be qualified by the observation that the archives brought from Vienna on the orders of Napoleon I contained archives which themselves had been taken from Belgium by Austria. Moreover, the vast operation undertaken by Napoleon, however outrageous and however much in conformity with the ideas of the time in respect of annexation of territories, nevertheless had the useful result of causing France to restore to the Netherlands in 1814, after the fall of the Napoleonic empire, 3,000 crates of Dutch political, diplomatic and judicial archives which had been removed from the Netherlands by Austria and which Napoleon I had brought back from Vienna to Paris.

30. The Treaties resulting from the Congress of Vienna in 1815, the Treaties of Versailles, Neuilly, Saint-Germain-en-Laye and Trianon, which terminated the First World War, and the peace treaties concluded at the end of the Second World War, brought only a relative degree of order to the problems of State archives, since the just restitutions which the vanquished were required by the victors to make to third States could not erase the memory of the removals—with varying degrees of justification—of archives by conquering States for their own benefit.

31. The Hitler regime is known to have systematically exploited the archives of territories conquered by force during the Second World War. This was the case, for instance, with the archives of Moravia, in the Sudetenland. In so doing, the German Third Reich obviously had ulterior political motives, not simply in respect of the whole of Europe, but regarding the Mediterranean, North Africa and the Middle East as well. It is also known that Hitler’s troops removed from various countries not only archives, but also works of art and objects which formed part of the cultural and historical heritage of the occupied countries.<sup>24</sup> The victors of 1945 who crushed the Hitlerite regime accorded extra attention to the question of archives and confiscated those which were in the possession of the Third Reich wherever they

deposited in Brussels. Some diplomatic records from Simancas were not returned to Spain until 1941.” (J. Favier, *Les archives*, 3rd ed., rev., “Que sais-je?” series, No. 805 (Paris, Presses universitaires, 1975), p. 35).

<sup>24</sup> As a consequence of the Hitlerite plundering, the 18 signatory countries of the “London Declaration” of 5 January 1943 reserved:

“all their rights to declare invalid any *transfers\** of, or *dealings\** with, *property\**, *rights\** and *interests\** of any description whatsoever which are, or have been, situated in the territories which have come under the occupation or control, direct or indirect, of the governments with which they are at war or which belong or have belonged, to persons, including juridical persons, resident in such territories. This warning applies whether such transfers or dealings have taken the form of open looting or plunder, or of transactions apparently legal in form, even when they purport to be voluntarily effected.” (M.M. Whiteman, *Digest of International Law* (Washington, D.C., United States Department of State, 1967, vol. 8, p. 1202.)

were found, the better to ascertain and pin-point the political and military liabilities of the Hitlerite regime.

32. In so doing, the Allies were simply dispensing justice. But, like all victors of all periods, they found it difficult to resist the temptations of their victories over both Germany and Japan. As a result, archives of German origin, concerning the *history* of the German Reich and its *Länder* from 1867 to 1945 were confiscated after the Second World War by France, the United Kingdom, the United States of America and the USSR.<sup>25</sup> In addition, a vast stock of German and Japanese *scientific and technical documents* was seized by the Americans. It was microfilmed and placed, by the Department of Commerce, at the disposal of American users. A technical information clearing house was set up in the Department of Commerce to be responsible for the selection and communication of the information.<sup>26</sup> Part of the historical archives was later restored to the German post-war Government.<sup>27</sup> The peace treaties reflected the Allies' concern not to overlook the important problem of archives in the modern world, and a number of provisions, which are considered below, were inserted into the peace treaties for this purpose.

## 2. THE AGE OF INFORMATION

33. The modern world is undergoing a scientific and technological revolution which has changed the factual background to the question of archives and, it would seem, must inevitably have an effect on the succession of States in this regard. The difficulties which used to arise between States because archives were indivisible and reproducing them was a very lengthy task no longer exist to such an extent, owing to modern reproduction methods. In the past, the problem was solved in a drastic manner, and the archives went to whoever fared best on the field of battle. The old idea of the indivisibility of archives, which aroused fears of the breaking up of collections and was responsible in some cases for the preservation of the integrity of

historical depositories, is more easily accepted by the parties, because photocopying and microfilming and other modern techniques make it possible to find solutions that are better suited to the situations which arise. The predecessor State can, without harm, leave to the successor State the archives to which it is entitled, in the assurance that they can be rapidly and conveniently reproduced. Moreover, UNESCO is assisting States with the microfilming of archives.<sup>28</sup>

34. Consequently, the phenomenal progress made in the reproduction of documents can, by simplifying it, radically change the factual background of the problem of the succession of States in respect of archives. New methods of reproduction, and also of printing, such as programmed "cold typesetting", photocomposition with recording "terminals", or typesetting by optical scanner, fully automatic page-setting and the introduction of visual display "terminals" for all these reproduction or printing operations can bring within the easy reach of man things which have been largely inaccessible to him in the past.

35. The scientific and technological progress which has made this revolution in reproduction and printing possible has also radically altered the very concept of archives and documentation. Documentation units, libraries, collections of old or recent archives, centres for analysis and indexing, cataloguing and distribution throughout the world, and principally in the United States of America, are experiencing an astonishing revolution in their organization and operation, as a result of the development of automatic systems. Remote cataloguing, automatic data processing, the possibility of long-distance consultation of archive file-indexes, the steadily increasing number of terminals, which *eliminate the problems of distance and time* in gaining access to documentation, is evidence of this information revolution. As a result of the developments in data processing, the acquisition, cataloguing, storage, referencing, description of acquisitions, indexing, analysis, summarizing, evaluation, compilation, publication and distribution of documents have become appreciably easier and more accessible to larger numbers of users.

36. Because of the "documentary revolution" which is now beginning to take place before our eyes, the

<sup>25</sup> See R. Wolfe, ed., *Captured German and related records: A National Archives conference: papers and proceedings of the Conference on Captured German and Related Records, November 12-13, 1968, Washington, D.C.* (Athens, Ohio, Ohio University Press, 1975); H. Lötze and H.S. Brather, *Übersicht über die Bestände des Deutschen Zentralarchivs Potsdam* (Berlin, Rütten und Loening, 1957).

<sup>26</sup> Cf. J.-L. Crémieux-Brilhac, "Documents et réflexions sur quelques développements récents de l'informatique documentaire aux Etats-Unis—Part 2: l'informatique au service du transfert des connaissances (Paris, La Documentation française, 1977). Extract, "Deux grands organismes nationaux de documentation", in *Problèmes politiques et sociaux* (Paris), La Documentation française, No. 321 (14 October 1977), p. 12.

<sup>27</sup> See, for example, the exchange of letters constituting an agreement between the United States of America and the Federal Republic of Germany relating to the transfer of German files and archives, Bonn, 14 March 1956 and Bonn/Bad Godesberg, 18 April 1956 (United Nations, *Treaty Series*, vol. 271, p. 325).

<sup>28</sup> At its eighth session (Montevideo, in 1954), the General Conference of UNESCO decided to set up a "mobile microfilm unit" and to make it available to States requesting it. This unit, whose services have already been employed by many States, is made available to the State with its facilities and equipment and the personnel qualified in all techniques and applications of microfilming, microphotography, paleography and the conservation of archives. The mobile unit was set up mainly in view of the risks to which archives are exposed in certain areas of the world through climate, insects, earth tremors, and so forth. However, there is certainly no reason why it could not be used at the request of States wishing to settle a dispute over archives by microfilming them.

problem of archives may in future take on a new form. In a recent work, it is stated:

The revolution in the storage and transfer of knowledge has begun. The computer is one of the instruments of this revolution; it is also the manifestation of it. Thanks to the computer and all the latest means of transmission and communication (satellites or television, for example) which supplement older methods such as the book, we are plunging into *the age of information*. . . . *This is a major political phenomenon which can change power relationships at both the national and international levels\**, broaden the means of legislative control, change the methods of administrative action and, finally, bring about a new type of "information power".<sup>29</sup>

37. It is perfectly clear, therefore, that the question of archives is today one of cardinal importance. *Information, knowledge and know-how have become one of the keys to power*. Because the possession and utilization of documents and archives of all sorts have become so necessary in the modern world, many countries have extensively computerized these sectors, with the result that the computer, crammed with documents and archives which it digests, has itself become an invaluable and irreplaceable archive. However, the undisputed reign of the computer, which is not within the reach of all countries, is on the verge of creating monopolies of information, and hence of decision-making, in international relations. Thus *the possession of archives and documents, and their effective and rational use demonstrate the full political and economic impact of the information system*. They confer extraordinary significance and a new importance on the problem of the succession of States in respect of archives.

38. Scientific and technological progress have indeed both simplified and complicated the problem of archives. On the one hand, they have made information, and therefore documents, one of the keys to power; on the other hand, they have made available to mankind unprecedented means of reproduction and distribution. But, by the same token, they have created a whole series of new difficulties. In the field of archives, documentation and information, as in other fields, an appalling gulf is forming between the developed and the other countries, comparable to the gulf that separates the world of the prehistoric plough from that of the miracle of electronics. The solutions to be found to the problems of archives in the context of succession of States, in particular of succession in consequence of decolonization, must take account of the fact that the means of reproduction which the developed countries have mastered to a high degree should make it easier for the latter to transfer or to restore the originals of archives to the less developed countries in all cases in which they ought to be returned to them. The development of documentary data processing and the spread of automation should

serve to promote both the transfer of knowledge and the socio-cultural enrichment of the poorer countries.

39. It has been shown that microfilm and modern methods of reproduction, which produce copies so faithful as to rival the original, can be considered as the modern remedy for "archivistic ills" by nipping in the bud disputes between States in respect of archives. While the progress achieved in reproduction is undoubtedly impressive, the problem would remain unsettled if the State entitled to the return of the originals of its archives received only the microfilm or some other reproduction of them. There is an immeasurable difference between the value of an original picture and that of a copy, however perfect it might be. Some historical archives, for example, are of irreplaceable value to a country's cultural heritage. This touches on another aspect—the cultural value of archives—which is dealt with later.

### C. The claim to archives and the protection of the national cultural heritage

40. The problem discussed in this study on State archives *covers a field that is at once larger and more circumscribed than the cultural heritage* which is currently the legitimate concern of UNESCO, at the request of the majority of its Member States. The archives which are the subject of this study represent only part of the cultural heritage in cases where they comprise historical or cultural documents. However, they are more than merely "cultural" in cases where they involve documents required for a country's routine, day-to-day and current administration. The study does not ignore the other problems connected with the cultural heritage—pictures, sculptures, statues, works of art, zoological, botanical, archaeological or mineralogical specimens, etc. These are, however, covered by the relevant draft articles relating to the transfer of State property in the event of a succession of States, provided that, and in so far as, these works of art constitute State property.

#### 1. ACTION BY UNESCO

41. UNESCO has focused its attention both on the problem of archives as such and on the question of archives as part of a people's cultural heritage.

##### (a) Action taken by UNESCO with a view to the restitution of archives

42. Referring mainly to colonial occupation, UNESCO emphasized the importance [of archives] for the general, cultural, political and economic history of the countries which were under foreign . . . domination and called for the conclusion of bilateral agreements for the transfer of archives to recently independent successor States. At its eighteenth session, held in Paris in October–November 1974, the General Conference of UNESCO adopted the following resolution:

<sup>29</sup> J. Michel and J.-L. Crémieux-Brilhac, "La révolution documentaire aux Etats-Unies", *Problèmes politiques et sociaux*, (op. cit.), p. 3.

*The General Conference,*

Bearing in mind that a great number of Member States of UNESCO have been in the past for longer or shorter duration under foreign domination, administration and occupation,

Considering that archives constituted within the territory of these States have, as a result, been removed from that territory,

Mindful of the fact that *the archives in question are of great importance for the general, cultural, political and economic history of the countries which were under foreign occupation, administration and domination,\**

Recalling recommendation 13 of the Intergovernmental Conference on the Planning of National Documentation, Library and Archives Infrastructures, held in September 1974, and desirous of extending its scope,

1. *Invites* the Member States of UNESCO to give favourable consideration to the possibility of *transferring documents from archives constituted within the territory of other countries or relating to their history, within the framework of bilateral agreements\*;*

2. *Recommends* that, in consultation with the appropriate non-governmental organizations, the Director-General envisage the possibility of a detailed study of such transfers and that he inform the nineteenth session of the General Conference thereof.<sup>30</sup>

43. Furthermore, at the twentieth session of the General Conference the Director-General of UNESCO submitted a report in which he set out:

principles and guidelines . . . to provide to all Member States an instrument of reference intended to facilitate negotiations leading to the conclusion of special agreements, either bilateral or, if appropriate, multilateral, with a view to the resolution of conflicting archival claims,<sup>31</sup>

and went on to say:

Because the patrimonial character of archives as State property derives from the basic sovereignty of the State itself, problems involved in the ownership and transfer of State archives are fundamentally legal in character. Such problems should therefore be resolved primarily through bilateral or multilateral negotiations and agreements between the States involved.<sup>32</sup>

(b) *Action taken by UNESCO for the restitution of archives as part of the reconstitution and protection of the national cultural heritage*

44. The concern, as described above, that UNESCO has shown for problems of archives as such has been combined with an equal concern for archives considered as important parts of the cultural heritage of nations. UNESCO and its committees and groups of experts have at all times considered archives as "an essential part of the heritage of any national community", a heritage which they are helping to reconstitute and whose restitution or return to the country of origin they are seeking to promote. In their view, historical documents, including manuscripts, are

"cultural property" forming part of the cultural heritage of peoples.<sup>33</sup>

45. The solutions which the Commission might reach in the matter of succession to State archives should therefore, in cases where the archives are of historical or cultural interest, take generously into account the plea made in 1977 by the Director-General of UNESCO for the return of an irreplaceable cultural heritage to those who created it. This appeal arose out of a resolution adopted by the General Conference of UNESCO at its nineteenth session, which invited the Director-General:

(a) to take all necessary measures with a view to the establishment, by the General Conference at its twentieth session, of an intergovernmental committee entrusted with the task of seeking ways and means of facilitating bilateral negotiations for the restitution or return of cultural property to the countries having lost them as a result of colonial or foreign occupation, . . .

(b) to launch an appeal to Member States to take all measures likely to bring about a state of mind conducive to the return of cultural property to the countries of origin, . . .<sup>34</sup>

The appeal launched by the Director-General contains the following passages:

The vicissitudes of history have . . . robbed many peoples of a priceless portion of this inheritance in which their enduring identity finds its embodiment.

. . .

The peoples who were victims of this plunder, sometimes for hundreds of years, have not only been despoiled of irreplaceable masterpieces but also robbed of a memory which would doubtless have helped them to greater self-knowledge and would certainly have enabled others to understand them better.

They know, of course, that art is for the world and are aware of the fact that this art, which tells the story of their past and shows what they really are, does not speak to them alone. They are happy that men and women elsewhere can study and admire the work of their ancestors. They also realize that certain works of art have for too long played too intimate a part in the history of the country to which they were taken for the symbols linking them with that country to be denied, and for the roots they have put down to be severed.

These men and women who have been deprived of their cultural heritage therefore ask for the return of at least the art treasures which best represent their culture, which they feel are

<sup>30</sup> UNESCO, *Records of the General Conference, Eighteenth Session, Resolutions* (Paris, 1974), pp. 68–69, resolution 4.212.

<sup>31</sup> UNESCO, "Report by the Director-General on the possibility of transferring documents from archives constituted within the territory of other countries (document 20 C/102 of 24 August 1978), para. 18.

<sup>32</sup> *Ibid.*, para. 19.

<sup>33</sup> See documents of the nineteenth session of the General Conference of UNESCO (Nairobi, October–November 1976), in particular, "Report by the Director-General on the Study on the possibility of transferring documents from archives constituted within the territory of other countries or relating to their history, within the framework of bilateral agreements" (document 19 C/94 of 6 August 1976); the report by the Director-General at the following session of the General Conference (document 20 C/102 (*loc. cit.*)); report of the Committee of Experts which met from 29 March to 2 April 1976 at Venice (document SHC-76/CONF.615/5); report of the Committee of Experts to promote the restitution or return of cultural property (Dakar, 20–23 March 1978) (document CC-78/CONF.609/3); and Statutes of the Intergovernmental Committee for the promotion of the return of cultural property to its country of origin or its restitution in the case of illegal appropriation (UNESCO, *Records of the General Conference, Twentieth Session, Resolutions* (Paris, 1978), pp. 92–93, resolution 4/7.6/5, annex).

<sup>34</sup> *Ibid.*, *Nineteenth Session, Resolutions* (Paris, 1976), p. 48, resolution 4.128.

the most vital and whose absence causes them the greatest anguish.

This is a legitimate claim.

...

I solemnly call upon the Governments of the Organization's Member States to conclude bilateral agreements for the return of cultural property to the countries from which it has been taken; to promote long-term loans, deposits, sales and donations between institutions concerned, in order to encourage a fairer international exchange of cultural property; ...

...

I call on universities, libraries ... that possess the most important collections, to share generously the objects in their keeping with the countries which created them and which sometimes no longer possess a single example.

I also call on institutions possessing several similar objects or records to part with at least one and return it to its country of origin, so that the young will not grow up without ever having the chance to see, at close quarters, a work of art or a well-made item of handicraft fashioned by their ancestors.

...

I call on historians and educators to help others to understand the affliction a nation can suffer at the spoilation of the works it has created. The power of the *fait accompli* is a survival of barbaric times and a source of resentment and discord which prejudices the establishment of lasting peace and harmony between nations.

Finally, I appeal with special intensity and hope to artists themselves and to writers, poets and singers, asking them to testify that nations also need to be alive on an imaginative level.

Two thousand years ago, the Greek historian Polybius urged us to refrain from turning other nations' misfortunes into embellishments for our own countries. Today when all peoples are acknowledged to be equal in dignity, I am convinced that international solidarity can, on the contrary, contribute practically to the general happiness of mankind.

The return of a work of art or record to the country which created it enables a people to recover part of its memory and identity, and proves that the long dialogue between civilisations which shapes the history of the world is still continuing in an atmosphere of mutual respect between nations.<sup>35</sup>

### (c) *The right to a collective "cultural memory"*

#### (i) *A new international cultural order*

46. "The men and women of these countries have the right to recover these cultural assets which are part of their being."<sup>36</sup> This sentence from the appeal by the Director-General of UNESCO to all States sums up perfectly the touching quest of the countries which have escaped from the dark night of colonialism and are looking for their *lost collective memory*. At the same time it expresses *the right of peoples to a cultural identity which constitutes the very basis of their national identity*. The question of the restitution of cultural property, including historical or cultural archives, is therefore not one of "*Kulturkampf*" nor of narrow nationalism. The "right to a cultural memory" provided a particularly significant title for a symposium held at Palermo (Italy) in October 1978 to consider in a spirit of co-operation the problem of "cultural treasures in exile"—in other words, the

restitution to former colonial countries of their cultural heritage. There is an ever-growing movement towards a *new international cultural order* linked with the new international economic and legal order. The development is multi-dimensional, and therefore includes an undeniable cultural aspect.<sup>37</sup>

47. All or almost all the sources for the history of the African continent at present depend on Europe, in so far as they are conserved in European archives. The same is true of the Arab world, Asia and Latin America.<sup>38</sup> Though politically decolonized, the States of the third world still remain dependent in terms of their archives and history. Yet the right of each country to its archival heritage is incontestable. The archive documents constitute for each people a precious part of its cultural and historical heritage, as well as an essential instrument for the management of public affairs.

48. An example has been noted of an African country which, for its newly built national museum, had to be content with reproductions and photographs of its own works of art when faced with the refusal of Western museums to return to it at least one or two pieces. The example of Nigeria is well known, where an episode in the war of conquest by the United Kingdom led to the dispersal of a great cultural heritage, notably bronzes and ivory masks classified among the masterpieces of the world. Some of them left Nigeria for museums in the United Kingdom, others followed the tortuous paths of the semi-licit art market and ended up either in other European or North American museums, or in private collections. A representative at the Palermo symposium caused a sensation by revealing that ... 11,000 specimens of Ecuadorian art of inestimable value, are to be found ... in the hands of a private collector in Milan (Italy), and that, in spite of all its efforts, the Government at Quito had not succeeded in obtaining restitution of even a part of them.

#### (ii) *The "four principles of Palermo"*

49. At the Palermo round table (October 1978), UNESCO attempted to define, first, the *nature* of the objects which might be claimed (and among these cultural archives and historical documents were again mentioned) and, secondly, the concept of *country of origin* entitled to claim the restitution of cultural objects and works of art. The problems are far from simple, and there is no point in concealing their complexity. The definition of cultural property alone

<sup>37</sup> Cf. M. Bedjaoui, *Towards a new international economic order* (Paris, UNESCO, 1979), pp. 75 *et seq.* and 245 *et seq.*

<sup>38</sup> For evidence of this statement, see the study by Christian Gut and Marieke Housseau, the result of a monumental analysis of information provided by the official State archive bodies (C. Gut and M. Housseau, "Éléments statistiques pour mesurer l'ampleur du problème", in *Dix-Septième Conférence internationale de la Table ronde des archives*, "Constitution et reconstitution des patrimoines archivistiques nationaux" (Paris, Imprimerie nationale, 1980), append.1).

<sup>35</sup> *The Unesco Courier* (Paris), 31st year, July 1978, pp. 4-5.

<sup>36</sup> *Ibid.*, p. 4.

presents almost insurmountable problems. Certain works have a universal value, either because of the message they transmit or the personality of their authors. National cultural assets, on the other hand, are objects constituting the essential wealth of a country's cultural memory and identity.

50. The nations of the third world fully realize that certain cultural assets have in the course of time become rooted in the history of the "borrower" country, and these nations are in fact prudent and selective in their claims. Thus they only call for restitution of the cultural or historic assets whose absence, in the criterion of the Director-General of UNESCO, "causes them the greatest anguish"—in other words, the art treasures most representative of the past and of their national culture.

51. In 1970, Belgium and Zaire, signed an agreement providing for the restitution to the former colony of objects representative of Zairian art. The directors of the Royal Museum of Central Africa, at Tervuren, have already returned certain objects of great value, and they are currently training Zairian experts to conserve them in their own country. Australia is doing the same for Papua New Guinea, which has been able to open a museum at Port Moresby thanks to the return of a large number of objects from Australian collections. In 1976, the Netherlands agreed to return to Indonesia certain assets of historical interest. France concluded an agreement with Laos in 1950, undertaking to return a number of works of art, and in 1968 France agreed to the restitution to Algeria of 300 museum pieces. Italy has undertaken to return to Ethiopia the famous Axum stele, an example of the Coptic splendour of the early Christian era.

52. Nevertheless, in defence of their refusal to make such restitution *de jure*, many countries continue to plead, as happened during the Palermo meeting, "the psychological aspects and the feelings of guilt associated with the act of restitution", in so far as that act seems to imply that the possession of the cultural property, historical archives, works of art etc. by the predecessor State was unlawful. But the situation will hardly be improved by maintaining the *status quo*, especially in view of the growing number of claims, which is bound to increase with time. In any event, in order to break down the psychological barriers, four principles were put forward at Palermo by way of suggestions, but were not discussed:

(a) Each people has the right as well as the duty to possess, conserve and transmit to posterity its own cultural heritage.

(b) All nations have the duty to grant aid and support to any people seeking to attain these objectives, in particular by returning any essential parts of that people's heritage which are kept elsewhere as a result of plunder, theft or illicit traffic. The aid takes the form also of scientific, technical and possibly financial co-operation in the reconstitution of the heritage.

(c) Each people has the duty to safeguard the survival of its cultural heritage by setting up museums equipped with the appropriate facilities for the satisfactory conservation of the objects.

(d) Each people should be aware that it is also in its own interest to have, distributed throughout the world, examples of the national culture as an essential contribution towards understanding between nations. Consequently, international or bilateral agreements leading to the restitution of works of art might at the same time contribute towards well-organized and official displays of those "cultural ambassadors" which are, in another country, the art treasures and traditional handicrafts of a foreign nation. This could be achieved on the basis of donations and long-term loans, as well as by the organization of an art market governed by internationally unified legislation.

53. Hand in hand with the essential restitutions should go a policy of long- or short-term deposits, and in particular exchanges of works of art between countries, once all question of ownership had been clarified, which together would constitute an effective method of making culture universal instead of letting it remain the monopoly of a few old-established States. It is in this way that all peoples will learn how each contributed towards "universal civilization", as René Maheu called it,<sup>39</sup> and "how man became human", to echo the title of an excellent recent book by Roger Garaudy.<sup>40</sup>

## 2. ACTION BY THE UNITED NATIONS

54. The protection and restitution of cultural and historical archives and works of art, with a view to the preservation and future development of cultural values, have received a great deal of attention in the United Nations, as evidenced in General Assembly resolutions 3026 A (XXVII) of 18 December 1972, 3148 (XXVIII) of 14 December 1973, 3187 (XXVIII) of 18 December 1973, 3391 (XXX) of 19 November 1975 and 31/40 of 30 November 1976. The resolution of 30 November 1976 contains the following passages:

*The General Assembly,*

...

*Convinced* that the promotion of national culture enhances a people's ability to understand the culture and civilization of other peoples and thus has a most favourable impact on international co-operation,

*Convinced also* that the protection by all means of national culture and heritage is an integral part of the process of preservation and future development of cultural values,

...

3. *Affirms* that the *restitution\** to a country of its *objets d'art*, monuments, museum pieces, *manuscripts\**, *documents\** and any other cultural or artistic treasures constitutes a step forward towards the strengthening of international co-operation and the preservation and future development of cultural values.

## 3. ACTION BY THE CONFERENCES OF NON-ALIGNED COUNTRIES

55. The Fourth Conference of Heads of State or Government of Non-Aligned Countries, held at Algiers

<sup>39</sup> R. Maheu, *La civilisation de l'universel* (Paris, Laffont, 1966).

<sup>40</sup> R. Garaudy, *Comment l'homme devint humain* (Paris, Jeune Afrique, 1978).



from 5 to 9 September 1973, had adopted a Declaration on the Preservation and Development of National Cultures, which stresses:

the need to reaffirm national cultural identity and eliminate the harmful consequences of the colonial era, so that ... national culture and traditions will be preserved.<sup>41</sup>

56. At the following summit meeting, which took place at Colombo from 16 to 19 August 1976, two resolutions on the subject were adopted by the Heads of State or Government of Non-Aligned Countries.<sup>42</sup> Resolution No. 17 contains the following passages:

**RESTITUTION OF ART TREASURE AND ANCIENT MANUSCRIPTS\* TO THE COUNTRIES FROM WHICH THEY HAVE BEEN LOOTED**

The Fifth Conference ...

1. *Recalls* the terms of the resolution adopted by the VIIth Islamic Conference of Foreign Ministers, held in Istanbul (Turkey),

2. *Reaffirms* the terms of the United Nations General Assembly resolution 3187 (XXVIII) and General Assembly resolution 3391 (XXX) concerning the restitution of works of art and *manuscripts\** to the countries from which they have been looted,

3. *Requests* urgently all States in possession of works of art and manuscripts to restore them promptly to their countries of origin,

4. *Requests* the Panel of Experts appointed by UNESCO which is entrusted with the task of restoring those works of art and manuscripts to their original owners, to take the necessary measures to that effect.

**D. History of the disputes concerning archives in the context of the succession of States**

57. The Special Rapporteur considers that, for the purpose of giving a general historical conspectus of the disputes relating to archives, he cannot do better than

<sup>41</sup> Documents of the Fourth Conference of Heads of State or Government of Non-Aligned Countries, "Economic Declaration", sect. XIV (A/9330 and Corr.1, pp. 73-74).

<sup>42</sup> Documents of the Fifth Conference of Heads of State or Government of Non-Aligned Countries, annex IV, resolutions Nos. 17 and 24 (A/31/197, pp. 136 and 148).

to submit a table of the agreements pertaining to transfers of archives concluded from 1600 to the present time. He has drawn up the table essentially on the basis of reports and tabulations prepared by Mr. Robert-Henry Bautier,<sup>43</sup> Mr. Charles Kecskeméti,<sup>44</sup> Mr. Bernard Mahieu<sup>45</sup> and Mr. Christian Gut.<sup>46</sup> The authors of these tabulations have indicated that they have taken into account the agreements discussed and referred to by the Special Rapporteur in his eighth report submitted to the Commission in 1976.<sup>47</sup>

58. Relying on all the works cited above, and on the agreements mentioned in his third, fourth, sixth and seventh reports,<sup>48</sup> the Special Rapporteur submits the following table, which makes no claim to be exhaustive. In so far as the table does not mention certain agreements which deal with archives but which are mentioned in the tabulations prepared by the expert archivists named above, the reason is that the treaties in question do not touch on the topic of the succession of States. A number of (mainly medieval) treaties concerning Europe which antedate the year 1600 the year chosen by the Special Rapporteur as the starting point, and some others later than 1600 are referred to in a doctoral thesis cited earlier in this report.<sup>49</sup>

<sup>43</sup> France, *Les archives dans la vie internationale* (op. cit.), pp. 11-56.

<sup>44</sup> "Les contentieux archivistiques: étude préliminaire sur les principes et les critères à retenir lors des négociations", UNESCO document PGI-77/WS/1, reproduced in: *Dix-Septième Conférence internationale de la Table ronde des archives*, "Constitution et reconstitution des patrimoines archivistiques nationaux" (1977), document 2.

<sup>45</sup> "Tableau historique des accords portant sur des transferts d'archives": *ibid.*, "Constitution et reconstitution des patrimoines archivistiques nationaux", (1977), appendix 2.

<sup>46</sup> "Constitution et reconstitution des patrimoines archivistiques nationaux" in: France, Direction des archives de France, *Actes de la dix-septième Conférence internationale de la Table ronde des archives* (Paris, Imprimerie nationale (at press)).

<sup>47</sup> *Yearbook* ... 1976, vol. II (Part One), p. 55, document A/CN.4/292.

<sup>48</sup> *Yearbook* ... 1970, vol. II, p. 131, document A/CN.4/226; *Yearbook* ... 1971, vol. II (Part One), p. 157, document A/CN.4/247 and Add.1; *Yearbook* ... 1973, vol. II, p. 3, document A/CN.4/267; *Yearbook* ... 1974, vol. II (Part One), p. 91, document A/CN.4/282.

<sup>49</sup> Jacob, *op. cit.*, *passim*.

**NON-EXHAUSTIVE TABLE OF TREATIES CONTAINING PROVISIONS RELATING TO THE TRANSFER OF ARCHIVES IN CASES OF SUCCESSION OF STATES**

No.	Date of treaty	Title of treaty and indication of pertinent articles	Signatory States	Object of treaty
1	17 January 1601	Treaty of Lyons	France/Savoy	Cession by the Duchy of Savoy of the territories of Bresse, Bugey, Gex and Valromey to France. Handing over of legal documents.

NON-EXHAUSTIVE TABLE OF TREATIES CONTAINING PROVISIONS RELATING TO THE TRANSFER OF ARCHIVES IN CASES OF SUCCESSION OF STATES (*continued*)

No.	Date of treaty	Title of treaty and indication of pertinent articles	Signatory States	Object of treaty
2	26 January 1622	Peace of Nikolsburg	Holy Roman Empire/ Transylvania	Return by Transylvania of the archives of the Chamber of Szepes seized during the military campaign and agreement for the exchange of authentic copies in respect to the archives of the seven counties of north-eastern Hungary ceded to Transylvania.
3	13 August 1645	Treaty of Brömsebro, art. 29	Sweden/Denmark	Handing over of archives to Sweden (upon the cession of various provinces).
4	30 January 1648	Treaty of Münster, art. 69	Spain/United Provinces of the Netherlands	Handing over of archives to the United Provinces.
5	24 October 1648	Treaty of Münster, art. 110	France/Holy Roman Empire	<i>Status quo</i> as regards archives removed.
6	24 October 1648	Treaty of Osnabrück, art. 16	Sweden/Holy Roman Empire	Reciprocal handing over of archives.
7	22 July 1657	Treaty of Wehlau	Poland/Transylvania	Return of cultural property.
8	25 February 1658	Treaty of Roskild, art. 10	Sweden/Denmark	Handing over of archives to Sweden (upon the cession of various provinces).
9	7 November 1659	Treaty of the Pyrenees, art. 54	France/Spain	Specifies a time-limit of three months for the handing over of archives to the successor State.
10	3 May 1660	Treaty of Oliva, art. 9	Sweden/Poland	Return of the archives of the Polish Chancellery (Treaty implemented in 1798: archives handed over to Prussia).
11	27 May 1660	Treaty of Copenhagen, art. 14	Sweden/Denmark	Handing over of archives to Sweden (upon the cession of various provinces).
12	26 December 1661	Treaty of Partition of territories beyond the Meuse, art. 6	Spain/United Provinces	Return of archives removed.
13	17 September 1678	Treaty of Nimeguen, art. 20	France/Spain	Reciprocal handing over of archives (following the cession and return of territories). Distinction drawn between <i>historical</i> documents (which the 17th century treaties called "literary"), which remain with the predecessor State, and <i>administrative</i> archives, which pass to the successor State (treaty of 5.2.1679, art. 22; treaty of 17.7.1679, art. 6). Return of the Lille and Ghent archives (treaty of 17.9.1678, art. 20); of Lorraine archives (treaty of 5.2.1679, art. 22).
14	5 February 1679	Treaty of Nimeguen, art. 22	France/Holy Roman Empire	
15	17 July 1679	Treaty of Nimeguen, art. 6	France/Holy Roman Empire	
16	26 September 1679	Treaty of Lund, art. 12	Denmark/Sweden	Handing over to the annexing State of letters and papers, irrespective of their nature, concerning administration (justice, the militia, taxes).
17	20 September 1697	Treaty of Ryswick, art. 16	France/Spain	Reciprocal handing over of archives (upon the cession and return of territories).
18	11 April 1713	Treaty of Utrecht, art. 22	France/Austria/United Provinces	Mutual cession of archives with the ceded provinces.
19	15 November 1715	Barrier Treaty	England/Holy Roman Empire/United Provinces	Roermond archives left intact, after the partition of Gelderland; handing over of inventories; issue of copies.
20	20 November 1719	Treaty of Stockholm, art. 3	Sweden/Hannover	Handing over of Bremen-Verden archives to Hannover.
21	21 January 1720	Treaty of Stockholm, art. 11	Sweden/Prussia	Reciprocal handing over of archives.
22	3 June 1720	Treaty of Stockholm, art. 11	Sweden/Denmark	Return of archives removed.
23	30 November 1721	Treaty of Nystad, art. 3	Sweden/Russia	Mutual cession of archives (operation continued until 1825).
24	28 August 1736	Convention of Vienna	Austria/France	Upon the cession of Lorraine and the Duchy of Bar to France, the archives followed the provinces, the Duke retaining his personal papers.
25	7 August 1743	Treaty of Åbo, art. 11	Sweden/Russia	Return of archives removed.
26	20 February 1746	Capitulation of Laeken, art. 14	France/Austria	Maintenance of archival collections intact.

NON-EXHAUSTIVE TABLE OF TREATIES CONTAINING PROVISIONS RELATING TO THE TRANSFER OF ARCHIVES IN CASES OF SUCCESSION OF STATES (*continued*)

<i>No.</i>	<i>Date of treaty</i>	<i>Title of treaty and indication of pertinent articles</i>	<i>Signatory States</i>	<i>Object of treaty</i>
27	18 October 1748	Treaty of Aachen, art. 11	France/Austria	Mutual cession of the archives of territories ceded and returned.
28	24 March 1760	Treaty of Limits, art. 16	France/Sardinia	Handing over by both parties in good faith, within a period of six months, of documents and title deeds concerning reciprocal cessions and those of territories exchanged under the treaties of Utrecht, Lyons and other earlier treaties.
29	November 1762	Negotiations	France/Savoy	Division of the archival collection of the Chambéry Accounts Office (one of two).
30	10 February 1763	Treaty of Paris, art. 22	France/England	Handing over of archives on the basis of the principle of functional connection (not implemented).
31	15 February 1763	Treaty of Hubertsburg	Prussia/Poland	Handing over by Prussia to Poland of archives belonging to Polish offices.
32	15 February 1763	Treaty of Hubertsburg	Prussia/Austria	Demand by Frederick II that Austria faithfully return all archives of Silesian localities, which were returned to him.
33	16 May 1769	Treaty of Versailles, art. 38	France/Austria	Reciprocal handing over of archives for all ceded provinces.
34	11 September 1772	Declaration of the Empress Maria Theresa (Vienna)	Austria/Poland	Declaration of claims to Polish cultural property.
35	13 September 1772	Declaration of King Frederick II (Berlin)	Prussia/Poland	Declaration of claims to Polish cultural property.
36	18 September 1772	Declaration of St. Petersburg	Russia/Poland	Declaration of claims to Polish cultural property.
37	16 March 1775	Treaty of Warsaw (first partition of Poland)	Austria/Poland	Archives remained in the ceded territories; commissioners were given responsibility for determining what was to be sent to Poland; authentic copies issued to Polish nationals for fixed charge.
38	20 October 1795	Treaty of St. Petersburg (third partition of Poland)	Russia/Prussia/Austria	Archives taken to Russia and then divided on the basis of territorial connection.
39	17 October 1797	Treaty of Campoformio, art. 13	France/Austria	Return by Austria of archives taken from the Austrian Netherlands.
40	9 February 1801	Treaty of Peace of Lunéville, art. 17	France/Austria	Return by Austria of archives taken from the Austrian Netherlands.
41	1 October 1801	Treaty of San Ildefonso	Spain/France	Cession of Louisiana to France: archives repatriated, except papers relating to frontiers.
42	30 April 1803	Treaty of Paris	France/United States of America	Handing over of deeds of ownership and sovereignty to the United States of America.
43	7 July 1807	Treaty of Tilsit	France/Prussia	Handing over of archives to the Grand Duchy of Warsaw and to the Netherlands (local archives and Berlin documents).
44	17 September 1809	Treaty of Fredrikshamm	Sweden/Russia	Transfer of archives by Sweden upon the cession of Finland to Russia.
45	2 December 1813	Secret Treaty of Frankfurt	Austria and its allies/ Elector of Hesse	Devolution of archives centralized at Cassel under the Kingdom of Westphalia; establishment of a Commission to separate the papers, instruments and documents belonging to the provinces formerly part of the Kingdom of Westphalia and to hand over to each sovereign those relating to the territories governed by him.
46	14 January 1814	Treaty of Kiel, art. 21	Sweden/Denmark	Handing over of archives upon the cession of Norway to Sweden.
47	30 May 1814	Treaty of Paris	France/Allied Powers	Return of archives assembled in Paris by Napoleon I.

NON-EXHAUSTIVE TABLE OF TREATIES CONTAINING PROVISIONS RELATING TO THE TRANSFER OF ARCHIVES IN CASES OF SUCCESSION OF STATES (*continued*)

No.	Date of treaty	Title of treaty and indication of pertinent articles	Signatory States	Object of treaty
48	29 March 1815	Protocol on the cessions by the King of Sardinia to the Canton of Geneva	Sardinia/Switzerland	Undertaking by the King of Sardinia to cede to the Canton of Geneva "the deeds, land registers and documents concerning things ceded as soon as possible" (art. 4).
49	29 March 1815	Treaty between Prussia and Hannover, art. 8	King of Prussia and the King of England in his capacity as King of Hannover	Reciprocal handing over within two months of "Crown deeds, documents and papers of the ceded territories".
50	3 May 1815	Treaty of Vienna, art. 38	Russia/Prussia for their respective territories in former Poland	Reciprocal return of archives concerning ceded territories; any document concerning both parties to be held by the party in possession of it, but an attested and authenticated copy to be given to the other party.
51	18 May 1815	Convention	Prussia/Saxony	The originals to be retained by Saxony, which shall hand over authenticated copies to Prussia.
52	7 June 1815	Treaty of Vienna, art. 14	Sweden/Prussia	Handing over of archives to Prussia (upon the cession of Swedish Pomerania).
53	16 March 1816	Treaty of Turin	Sardinia/Switzerland	Upon the delimitation of the frontiers between Sardinia and the Canton of Geneva, division of archives (including the apportionment of memoranda) on the basis of the principle of territorial connection.
54	7 October 1816	Boundary Treaty signed at Cleves, art. 44	Prussia/Netherlands	Handing over of administrative archives to the new authorities of the ceded territory; the administrative archives of communes divided by the new boundary to be handed over to the State receiving the chief town of the commune, which must "give access thereto to the other party whenever necessary".
55	11 November 1817	Treaty of Berlin	Prussia/Sweden	Reciprocal return of archives concerning the ceded territories.
56	22 February 1819	Treaty of Washington	Spain/United States of America	Handing over to the United States of America of documents relating to the ownership and sovereignty of Florida.
57	1 September 1819	Convention	Sweden/Denmark	Confirmation of the Treaty of Kiel (handing over of archives upon the cession of Norway to Sweden).
58	19 April 1839	Treaty of London, art. 13, para. 5	Netherlands/Belgium	Handing over of archives to Belgium (administrative files of the period 1815–1830).
59	5 November 1842	Convention	Netherlands/Belgium	Handing over of archives to Belgium pursuant to the Treaty of London.
60	13 September 1851	Convention	Denmark/Sweden/Norway	Handing over of documents by Denmark to Norway.
61	10 November 1859	Treaty of Zurich, arts. 2 and 15	France/Austria/Sardinia	Handing over by Austria of documents concerning Lombardy.
62	24 March 1860	Treaty of Turin	France/Sardinia	Cession of Savoy and Nice to France; establishment of a joint commission to prepare the transfers.
63	23 August 1860	Convention of Paris	France/Sardinia	Agreement on the cession to France of administrative, religious and judicial archives, the French Government to return Sardinian royal archives; provision made for copies of documents.
64	21 November 1860	Convention (Turin)	France/Sardinia	Handing over of archives; negotiations continued until 1949; transfers completed in 1952.

NON-EXHAUSTIVE TABLE OF TREATIES CONTAINING PROVISIONS RELATING TO THE TRANSFER OF ARCHIVES IN CASES OF SUCCESSION OF STATES (*continued*)

<i>No.</i>	<i>Date of treaty</i>	<i>Title of treaty and indication of pertinent articles</i>	<i>Signatory States</i>	<i>Object of treaty</i>
65	30 October 1864	Treaty of Vienna, art. 20	Prussia/Austria/Denmark	Handing over by Denmark of current files and archives taken from the Duchies (Schleswig, Holstein, Lauenburg); implemented in 1876.
66	3 October 1866	Treaty of Vienna, art. 18	Austria/Italy	Reciprocal handing over of administrative files on the basis of respect of archival collections.
67	30 March 1867	Convention on the cession of territory (Alaska)	United States of America/ Russia	Handing over to the United States of America of local archives existing in Alaska.
68	14 July 1868	Convention of Florence	Austria/Italy	Concluded upon completion of the work of the bilateral commission responsible for the implementation of the Treaty of Vienna.
69	10 June 1871	Treaty of Frankfurt, arts. 3 and 18	Germany/France	Reciprocal handing over of administrative files (however, documents transferred from Strasbourg and Colmar to other German provinces in accordance with the principle of territorial connection).
70	11 December 1871	Supplementary Convention of Frankfurt	Germany/France	Cession of archives in pursuance of the Treaty of Frankfurt.
71	26 April 1872	Convention of Strasbourg	Germany/France	Special Convention concerning the archives of the Strasbourg Academy.
72	10 December 1898	Treaty of Paris, art. 8	Spain/United States of America	Handing over to the United States of America of deeds of sovereignty concerning Puerto Rico, Guam and the Philippines. Cession to Cuba of local archives.
73	27 April 1906	Exchange of Notes constituting a Convention	Sweden/Norway	Division of previously joint archives of consulates.
74	4 August 1916 (published on 25 January 1917)	Convention for the purchase of territory, art. 1, para. 3	Denmark/United States of America	Upon the cession of the Virgin Islands by Denmark to the United States of America.
75	24 January 1918	Decree of People's Commissars (Moscow)	USSR/Poland	Decree on the preservation of monuments belonging to the Polish nation; return of cultural property.
76	28 June 1919	Treaty of Versailles, part III, sect. I, art. 78	Germany/Belgium	Cession of archives; in addition, article 158 concerns the handing over of the archives of Kiaochow by Germany to Japan.
77	28 June 1919	Treaty of Versailles, part III, sect. V, art. 52	Germany/France	Cession of archives.
78	10 September 1919	Treaty of Saint-Germain-en-Laye, arts. 93, 97, 192, 193, 194, 196, 249 and 250	Austria/The Allied Powers	Handing over by Austria of the archives of ceded territories; return of archives removed (Italy, Czechoslovakia, Romania, Poland, Yugoslavia).
79	27 November 1919	Treaty of Neuilly-sur-Seine, art. 126	Bulgaria/Kingdom of the Serbs, Croats and Slovenes	Handing over by Bulgaria of archives removed from the territory of the former Kingdom of Serbia.
80	9 January 1920	Financial Agreement (Paris Agreement)	Germany/Poland	Return of collections of archives to Poland.
81	2 February 1920	Treaty of Tartu	FSRSR (Federal Socialist Republic of Soviet Russia)/Estonia	Awarding the archives of local institutions to Estonia.
82	4 May 1920	Convention, arts. 5, 6 and 7	Austria/Italy	In pursuance of article 196 of the Treaty of Saint-Germain-en-Laye, Austria to cede to Italy all historical archives originating from territories transferred to Italy, with the exception to those removed to Austria before 1790 and those not meeting the criteria of territorial connection to origin.

NON-EXHAUSTIVE TABLE OF TREATIES CONTAINING PROVISIONS RELATING TO THE TRANSFER OF ARCHIVES IN CASES OF SUCCESSION OF STATES (*continued*)

No.	Date of treaty	Title of treaty and indication of pertinent articles	Signatory States	Object of treaty
83	18 May 1920	Convention	Austria/Czechoslovakia	Handing over of historical collections of Bohemia concentrated in Vienna, and of files subsequent to 1888.
84	2–4 June 1920	Treaty of Trianon, art. 77, paras. 175–178	Hungary/The Allied Powers	Cession of files less than 30 years old to Czechoslovakia and to the Kingdom of the Serbs, Croats and Slovenes, and to Romania (uniting of Transylvania and Banat to Romania).
85	12 July 1920	Treaty of Moscow, art. 9	FSRSR/Lithuania	Awarding the archives of local institutions to Lithuania.
86	10 August 1920	Treaty of Sèvres, art. 1	Italy/Poland/Romania/ Kingdom of the Serbs, Croats and Slovenes	States which were formerly part of the Austro-Hungarian monarchy or whose territories include part of the monarchy's former domain, to return each other's military, civil, financial and legal archives and provide for mutual exchange of information.
87	10 August 1920	Treaty of Sèvres, art. 1	Turkey/the Allied Powers	Handing over of the archives of ceded territories by Turkey and return of archives removed.
88	11 August 1920	Treaty of Moscow, art. 11	FSRSR/Latvia	Awarding archives of local institutions to Latvia.
89	14 October 1920	Treaty of Dorpat [Tartu], art. 29	FSRSR/Finland	Mutual handing over of archives concerning solely or mainly the other party and its history.
90	12 November 1920	Treaty of Rapallo, art. 2	Italy/Kingdom of the Serbs, Croats and Slovenes	Delimitation of the territory of Zara with provision, in a separate convention, for the division of the archives between the territory assigned to Italy and that remaining attached to the Kingdom of the Serbs, Croats and Slovenes.
91	18 March 1921	Treaty of Riga, art. 11	Poland/FSRSR	Return of archives removed; handing over to Poland of archives of central administrations responsible mainly for Polish affairs.
92	5 October 1921	Convention of Vienna, arts. 1–22	Austria/Romania	Handing over by Austria to Romania of archives, <i>objets d'art</i> and scientific and bibliographical material.
93	6 April 1922	Convention, arts. 1–6	Austria/Hungary/Italy/ Poland/Romania/ Czechoslovakia/ Kingdom of the Serbs, Croats and Slovenes	Intended to settle various difficulties arising as a result of the application of the Treaty of Saint-Germain-en-Laye, the convention provides for exchanges of copies of documents, the allocation of archives relating to industrial property, refers to the obligation to respect of collections and contemplates the preparation of lists of claims.
94	10 April 1922	Convention	Germany/Denmark	Mutual cession of administrative archives.
95	18 June 1922	Agreement of Oppeln	Germany/Poland	Handing over of administrative documents to Poland.
96	14 October 1922	Agreement of Vienna	Romania/Czechoslovakia	Mutual handing over of archives concerning the other party (inherited from the former Austro-Hungarian monarchy).
97	23 October 1922	So-called "Santa Margherita" Protocol and Exchange of Notes, arts. 23, 25, 26, 27, 28, 29, 30 and 31	Italy/Kingdom of the Serbs, Croats and Slovenes	Settlement of practical questions relating to the application of clauses of the Treaty of Rapallo, respect of archival collections (but reciprocal access and copies), principle of functional connection, the archives of the Republic of Venice relating to Zara remaining intact in the possession of the Kingdom of Italy.
98	27 February 1923	Agreement	France/Austria	Reciprocal handing over of documents.

NON-EXHAUSTIVE TABLE OF TREATIES CONTAINING PROVISIONS RELATING TO THE TRANSFER OF ARCHIVES IN CASES OF SUCCESSION OF STATES (*continued*)

No.	Date of treaty	Title of treaty and indication of pertinent articles	Signatory States	Object of treaty
99	3 May 1923	Convention of Danzig	Italy/France/Japan/ United Kingdom	Archives building and its contents returned to the city of Danzig, with the exception of archives returned to Poland; agreements may be made between Poland and Danzig for the conservation and management of these documents.
100	14 June 1923	Agreement of Poznań	Germany/Poland	Handing over of documents of waterway co-operatives and dike conservation associations.
101	26 June 1923	Convention	Austria/Kingdom of the Serbs, Croats and Slovenes	Pursuant to application of the Treaty of Saint-Germain-en-Laye: handing over by the Kingdom of the Serbs, Croats and Slovenes of archives removed and of archives of administrations of ceded territories; a start was made with the implementation of this convention.
102	24 July 1923	Treaty of Lausanne, arts. 67 and 139	United Kingdom/France/ Italy/Japan/Greece/ Romania/Kingdom of the Serbs, Croats and Slovenes/and Turkey	Reciprocal handing over of administrative documents concerning Turkey, Greece, Romania, the Kingdom of the Serbs, Croats and Slovenes, and former Turkish territories, with provision for the making of copies and photographs.
103	24 November 1923	Convention of Belgrade	Romania/Kingdom of the Serbs, Croats and Slovenes	Reciprocal handing over of archives.
104	16 April 1924	Convention of Bucharest	Hungary/Romania	Reciprocal handing over of archives.
105	12 August 1924	Convention of Belgrade	Italy/Kingdom of the Serbs, Croats and Slovenes	An instrument of general scope relating to the return of cultural property, documents, etc., the handing over of which had suffered some delay.
106	31 October 1924	Protocol of Vienna, arts. 1-9	Italy/Austria	Protocol supplementary to the Convention of 6 April 1922 on archives: archives having a functional connection to be ceded to Italy, those on sovereignty remaining in Austria; provision for reciprocal free access and copies, agreement on communications to individuals and their limits; agreement on military archives.
107	3 December 1924	Convention of Bucharest, arts. 1 (para. 5) and 18	Hungary/Romania	Exchange of papers relating to judicial proceedings, land registers and registers of births marriages and deaths.
108	17 January 1925	Protocol of Vienna	Italy/Austria	Convention supplementary to that of 31 October 1924 (No. 105), settling certain points relating to lists of documents to be returned to Italy by Austria and to the conditions of the return itself.
109	23 April 1925	Treaty of conciliation and arbitration	Poland/Czechoslovakia	Mutual handing over of archives inherited from the Austro-Hungarian monarchy concerning either party.
110	20 July 1925	Convention of Nettuno, arts. 1-15	Italy/Kingdom of the Serbs, Croats and Slovenes	Convention made pursuant to the treaty concerning Fiume signed at Rome on 27 January 1924: agreement on the maintenance at Fiume of the archives of the town and district, and handing over of the archives relating to Fiume kept in the territory of the Kingdom of the Serbs, Croats and Slovenes; conversely, the Kingdom to receive all archives concerning the territory transferred to it.
111	28 May 1926	Convention of Baden	Austria/Hungary	Handing over of collection of archives to Hungary; establishment of a permanent Hungarian delegation at Vienna.

NON-EXHAUSTIVE TABLE OF TREATIES CONTAINING PROVISIONS RELATING TO THE TRANSFER OF ARCHIVES IN CASES OF SUCCESSION OF STATES (*continued*)

<i>No.</i>	<i>Date of treaty</i>	<i>Title of treaty and indication of pertinent articles</i>	<i>Signatory States</i>	<i>Object of treaty</i>
112	27 December 1926	Agreement of Berlin	Germany/Poland	Handing over to Poland of administrative documents and registers of births, marriages and deaths.
113	15 October 1927	General Arbitration Convention	Denmark/Iceland	Reciprocal handing over of documents.
114	26 October 1927	Convention	Poland/Czechoslovakia	Mutual handing over of archives inherited from the Austro-Hungarian monarchy concerning either party.
115	23 May 1931	Convention of Rome, arts. 1-9	Italy/Czechoslovakia	Settlement concerning an exchange of documents or copies relating to military personnel who had been members of the former Austro-Hungarian army.
116	26 October 1932	Agreement of Vienna	Austria/Poland	Handing over of archives to Poland (implementation in 1938).
117	30 January 1933	Convention of Belgrade, arts. 1-11	Romania/Yugoslavia	Reciprocal exchange of archives.
118	15 December 1933	Convention	Germany/Denmark	Mutual cession of archives.
119	1934	Decision of Congress of the United States of America	United States of America/ Philippines	Transfer to the Philippines of archives seized in 1902.
120	2 February 1935	Agreement of Rome, arts. 15-16	Austria/Italy	General cultural agreement providing, as regards archives, for exchanges of originals or copies, subject to observance of the rule on respect of collections; direct loans between repositories of the two States.
121	16 February 1935	Cultural Convention, arts. 13-15	Hungary/Italy	Containing clauses, with regard to Hungary, analogous to those relating to Austria in the Agreement mentioned above.
122	31 May 1935	Protocol of Return	Romania/USSR	Return of 1,443 crates of archival documents and securities evacuated to Moscow by the Romanian Government in 1917.
123	1937	Exchange of Notes	Denmark/Norway	Transfer of archives from Denmark to Norway.
124	23 November 1938	Cultural Agreement, art. 27	Germany/Italy	Agreement for facilitating the reciprocal loan of documents between both States in the interest of scientific research.
125	23 March 1939	Agreement of Tokyo	Italy/Japan	Convention on cultural collaboration.
126	7 September 1940	Treaty of Craiova, annex B, item 2	Bulgaria/Romania	Cession of archives of the southern Dobrudja and issue of authentic copies of central archives to Bulgaria.
127	December 1940	Exchange of letters constituting an Agreement	Spain/France	Handing over to Spain of the Simancas archives, which had been transferred to France by Napoleon I and had remained in Paris after 1814 (implemented in May-July 1941).
128	8 April 1943	Agreement of Bucharest	Italy/Romania	Convention on cultural collaboration (denounced on 4 March 1950).
129	11 February 1945	Yalta Conference	USSR/United States of America/United Kingdom	Laid down the principles governing reparations.
130	2 August 1945	Potsdam Agreements	USSR/United States of America/United Kingdom/France	Specified the terms for the return of property looted in the occupied territories, particularly Poland.
131	20 February 1945	Act No. 10 of the Allied Control Council [Germany], art. 2, para. 1(b)	Allied Powers	Any looting of public property declared to be a war crime.
132	12 February 1946	Mutual Agreement	Poland/Czechoslovakia	Reciprocal return of archives.
133	27 January 1947	Aide-mémoire relating to the Peace Treaty with Germany	Poland/United Nations	Documents transmitted to the United Nations by the Polish Government, for the Conference of Deputy Ministers for Foreign Affairs preceding the Peace Treaty with Germany; reaffirmation of Poland's claims to the return of collections of archives.



NON-EXHAUSTIVE TABLE OF TREATIES CONTAINING PROVISIONS RELATING TO THE TRANSFER OF ARCHIVES IN CASES OF SUCCESSION OF STATES (*continued*)

<i>No.</i>	<i>Date of treaty</i>	<i>Title of treaty and indication of pertinent articles</i>	<i>Signatory States</i>	<i>Object of treaty</i>
134	10 February 1947	Treaty of Paris, arts. 7, 12, 23, 25, 29, 37, 75, 77 and 78; Annex X, art. 4; Annex XIV, arts. 1 and 7	Italy/Allied Powers	Return by Italy to France of archives relating to Savoy and Nice antedating 1860 and not yet returned, pursuant to the instruments of 24 March and 23 August 1860. Return by Italy to China of archives and cultural property relating to Tientsin. Cession or return to Yugoslavia of archives which had been removed or those which should be ceded to Yugoslavia pursuant to the Agreements of 1924 and 1928, and those relating to newly ceded territories (Istria, Zara, etc.). Cession to the territory of Trieste of all archives and property concerning it. Return by Italy to Albania and to Ethiopia of archives removed from those territories.
135	10 February 1947	Treaty of Paris, particularly chap. V, art. 22	Bulgaria/Finland/Romania/Allied Powers	Return to Bulgaria, Finland and Romania of all looted documents and property, or compensation by articles of equal value (principal Powers concerned: Poland, Czechoslovakia, Yugoslavia).
136	10 February 1947	Treaty of Paris, art. 11	Hungary/Allied Powers	Handing over to Czechoslovakia and Yugoslavia of historical archives constituted on territories ceded between 1848 and 1919.
137	19 October 1947	Protocol of Sofia	Bulgaria/Romania	Return by Romania to Bulgaria of archives and official documents.
138	28 August 1948	Convention	Hungary/Romania	Exchange of court papers and administrative documents.
139	8 March 1949	Exchange of letters constituting an Agreement	France/States of former Indochina	<i>Status quo</i> with respect to possession of archives.
140	1 August 1949	Exchange of letters constituting an Agreement	France/Italy	Protocol concluding the work of the joint Franco-Italian commission appointed pursuant to article 7 of the Treaty of Paris: Handing over to France of documents of local interest (Savoy, Nice, Bresse, Bugey, Gex), extracted from collections maintained in Italy. Handing over of documents relating to Italian local history maintained in French archives. Provision for the preparation of a protocol on reciprocal loans.
141	6 August 1949	Exchange of letters constituting an Agreement	Italy/Yugoslavia	Settlement of questions pending between the two countries, under article 67 and paras. 16 and 17 of annex XIV to the Treaty of Paris; procedure to be followed in the case of claims relating to archives.
142	4 November 1949	Agreement of Paris	France/Italy	Cultural convention providing for exchanges of information and documentary material.
143	14 January 1950	Declaration	United Nations	Concerning the devolution to the various States concerned of material of artistic, historical and bibliographical interest recovered in Germany by the allied armies.
144	15 January 1950	Exchange of letters constituting an Agreement	France/States of former Indochina	Agreement on the division of archives.
145	22 November 1950	Agreement on the importation of educational, scientific and cultural materials	States Members of the United Nations and of UNESCO	General agreement on the free circulation of documents.

NON-EXHAUSTIVE TABLE OF TREATIES CONTAINING PROVISIONS RELATING TO THE TRANSFER OF ARCHIVES IN CASES OF SUCCESSION OF STATES (*continued*)

No.	Date of treaty	Title of treaty and indication of pertinent articles	Signatory States	Object of treaty
146	15 December 1950	Resolution 388 A (V) of the General Assembly of the United Nations, art. 1, para. 2	Italy/Libya/United Nations	Independence of Libya; transfer to Libya of relevant documents of an administrative character or of technical interest.
147	23 December 1950	Agreement of Rome, arts. 1–9	Italy/Yugoslavia	Agreement relating to the division of archives and documents of administrative and historical interest relating to the territories ceded pursuant to the Treaty of Paris; criteria of functional relevance to be observed, but also those of territorial origin; establishment of a joint commission with headquarters at Gorizia.
148	2 February 1951	Agreement of Paris	France/India	Agreement made in consequence of the cession by France to India of the former <i>comptoir</i> of Chandernagore; France to maintain the historical archives and India to receive archives necessary for administration.
149	8 November 1951	Agreement of London	Italy/United Kingdom	Agreement laying down identical conditions in both countries for the access of research workers to documents.
150	5 December 1951	Agreement of Rome	Italy/Netherlands	General agreement on cultural collaboration.
151	24 March 1952	Agreement of Rome, art. 12	Austria/Italy	Confirmation of the provisions of articles 15 and 16 of the cultural agreement of 2 February 1935; general agreement on cultural collaboration.
152	25 April 1952	Protocol of agreement	Norway/Sweden	Cession of archives to Norway.
153	30 June 1953	Exchange of letters constituting an Agreement	Federal Republic of Germany/France	Settlement of the Alsace–Lorraine dispute; maintenance of the <i>status quo</i> and microfilming.
154	8 September 1953	Exchange of letters constituting an Agreement	Federal Republic of Germany/France	Same object as the above-mentioned exchange of letters.
155	30–31 October 1953	Standing convention	Belgium/Netherlands	Exchange of archives on the basis of the principle of functional connection.
156	5 October 1954	Memorandum of agreement signed at London	United Kingdom/United States of America/Italy/Yugoslavia	Italy to resume possession of the territory of Trieste and the zones hitherto administered by the allied military government; Italy thus legitimately retains custody of the archives relating to the region.
157	6 October 1954	Agreement of Paris, arts. 1–5	France/Italy	Handing over by Italy to France of administrative, functional, domanial, notarial (original) and historical archives (in the form of microfilm) relating to the ceded territories of Tenda and Briga.
158	21 October 1954	Agreement of New Delhi, art. 33	France/India	Agreement identical with that concerning Chandernagore and relating to the former French <i>comptoirs</i> of Yanaon, Pondicherry, Karikal and Mahé; France to retain custody of the historical archives.
159	15 May 1955	Treaty of State signed at Vienna	Austria/four Occupying Powers (United States of America, United Kingdom, USSR, France)	Return of archives and cultural property (Austria, Italy, Yugoslavia)
160	2 October 1956	Convention	Hungary/Yugoslavia	Handing over of documents to Yugoslavia.
161	28 March 1958	Exchange of letters constituting an Agreement	Poland/Czechoslovakia	Settlement of various questions in dispute, some of them concerning archives.
162	19 April 1958	Protocol of agreement	Hungary/Yugoslavia	Handing over of documents to Yugoslavia.
163	8 April 1960	Frontier Treaty signed at The Hague, art. 8	Netherlands/Federal Republic of Germany	Reciprocal cession of archives corresponding to ceded territories.
164	28 September 1960	Exchange of letters (Moscow)	Romania/USSR	Handing over of archives by the USSR to Romania.

NON-EXHAUSTIVE TABLE OF TREATIES CONTAINING PROVISIONS RELATING TO THE TRANSFER OF ARCHIVES IN  
CASES OF SUCCESSION OF STATES (*continued*)

<i>No.</i>	<i>Date of treaty</i>	<i>Title of treaty and indication of pertinent articles</i>	<i>Signatory States</i>	<i>Object of treaty</i>
165	3 December 1960	Agreement of Rome	Italy/Yugoslavia	The contracting parties undertake to facilitate the access of each other's research workers to archives, libraries and museums, very particularly in the case of documents relating to the history of either of the States concerned.
166	29 May 1961	Protocol of agreement	Poland/German Democratic Republic	Mutual return of archives which had been removed.
167	15 September 1961	Protocol of agreement, arts, 1, 2 and 3	Italy/Yugoslavia	Agreement for the settlement of questions relating to the return of archives to Yugoslavia, providing for the handing over of the last documents (many of them from the archives of Trieste) and payment of a sum to meet the cost of the microfilming of documents relating to Yugoslav territory of the period from 1718 to 1918, which will remain in Trieste.
168	17 May 1965	Agreement of Rome	France/Italy	Amendment of article 1 of the Agreement of 4 November 1949.
169	21 September 1965	Protocol	Italy/Hungary	The contracting parties will facilitate study of archival material in both countries, in the interest of historical research and within the limits allowed by the respective regulations.
170	23 December 1966	Exchange of letters constituting an Agreement	France/Algeria	Elaboration of principles governing consultation and collaboration in the matter of archives.
171	7 June 1967	Protocol of Return	France/Algeria	Handing over to Algeria of a first batch of historical archives concerning the period prior to 1830.
172	1 September 1972	Convention of The Hague	The Netherlands/Indonesia	Mutual microfilming.
173	9 April 1973	Agreement of Mogadishu	Italy/Somalia	Addendum to the cultural agreement of 26 April 1961.
174	31 December 1974	Treaty of Lisbon	Portugal/India	Recognition of India's sovereignty over Goa, Damān, Diu, Dadra and Nagar Aveli; cession to India of administrative, judicial and other archives; transfer to Portugal of other documents; provision for authentic copies.
175	14 March 1975	Exchange of Notes constituting an Agreement	Portugal/India	Conservation in India of archives originating in the ceded territories which concern other Indian territories; conversely, archives in Portugal concerning the ceded territories but also other Indian territories will remain in the former metropolitan country.
176	10 April 1975	Protocol of Return	France/Algeria	Handing over of a second batch of archives concerning the period prior to 1830.
177	22 April–20 May 1975	Exchange of diplomatic correspondence	France/Algeria	Algeria reserves its rights to its historical archives antedating colonization; France declares that it has returned everything that was returnable and declares itself prepared to permit the microfilming of its collections, both of documents dated before 1830 and those of later date.
178	5 July 1975	General Co-operation Agreement, art. 6	Portugal/Cape Verde	Each country will deliver to the other authentic copies of documents held in its archives.
179	12 July 1975	General Co-operation Agreement, art. 5	Portugal/Sao Tome and Principe	Each country will deliver to the other authentic copies of documents held in its archives.

NON-EXHAUSTIVE TABLE OF TREATIES CONTAINING PROVISIONS RELATING TO THE TRANSFER OF ARCHIVES IN CASES OF SUCCESSION OF STATES (*concluded*)

No.	Date of treaty	Title of treaty and indication of pertinent articles	Signatory States	Object of treaty
180	2 October 1975	General Co-operation Agreement, art. 5	Portugal/Mozambique	Same provisions as under No. 178 above.
181	10 November 1975	Agreement of Osimo	Italy/Yugoslavia	Convention on cultural collaboration.
182	22 November 1975	Recommendation of Djakarta	Netherlands/Indonesia	Joint recommendation by experts concerning cultural co-operation (including the transfer of archives).
183	28 January 1977	Memorandum of Willemstad	Netherlands/Antilles	Convention on cultural collaboration prepared by the Inter-Governmental Commission of the Antilles.

### E. General principles respecting succession to State archives

59. The drafting of an international law concerning archives is proving a difficult and slow process. Nevertheless, we are gradually emerging from the general confusion which had long prevailed in this field and which is explained to a large extent by the power relationships reflected in the frequently uncompromising provisions concerning archives in peace treaties between States. But before identifying the general principles which, seemingly, should govern succession to State archives, one should draw the conclusions from State practice, as it is reflected in the foregoing table.

#### 1. GENERAL REMARKS ON THE PRACTICE FOLLOWED BY STATES: CONCLUSIONS DRAWN FROM THE STUDY OF THE FOREGOING TABLE

60. Even a cursory look at State practice in respect of succession to State archives discloses a number of facts:

(a) Archival clauses are very *common* in treaties on the cession of territories concluded between *European Powers*, and are almost always *absent* in cases of *decolonization*.

(b) The removal of archives is a universal and timeless phenomenon. In almost all cases, they are returned sooner or later to their rightful owners, except, it seems, in cases of decolonization. But time had not yet run its full course or produced its effect in this field.

(c) Archives of an *administrative or technical nature* concerning the territory affected by the succession of States pass to the successor State in *all types of State succession*, and generally without much difficulty.

(d) Archives of an *historical nature* pass to the successor State depending to some extent on the circumstances; archivists cannot always explain their transfer to the successor State nor, in the converse

case, can jurists explain why they are kept by the predecessor State.<sup>50</sup>

61. With regard to the first conclusion, practically all treaties on the transfer of territory concluded in Europe *since the Middle Ages* contain special, and often very precise, clauses concerning the treatment of the archives of the territories to which the succession of States relates.<sup>51</sup> The cases of State succession dealt with in such treaties cover, by and large, according to the classification used by the Commission, those concerning the transfer of a part of a territory of one State to another State and the separation of one or more parts of the territory of a State.

62. Conversely, in modern cases of decolonization, very few treaty provisions exist regarding the treatment of archives, despite the very large number of newly independent States. The absence of archival clauses from agreements relating to the independence of colonial territories seems the more surprising as these agreements, of which there are many, govern after all succession not only to immovable but also to movable property, i.e. property of the same type as the archives themselves.<sup>52</sup>

<sup>50</sup> These various conclusions are, with some minor differences, those drawn by Kecskeméti in his study "Les contentieux archivistiques ..." (*loc. cit.*) [see footnote 44 above], which eventually constituted the substance of UNESCO document 20 C/102 (see footnote 31 above).

<sup>51</sup> See the illuminating historical study by Jacob, *op. cit.*

<sup>52</sup> There are very many treaties relating to the transfer of *judicial archives* in cases of *decolonization*. However, this fact by no means contradicts the Special Rapporteur's general remarks. Such cases involve the transfer of judicial records of litigation still under adjudication in courts of appeal or cassation situated in the territory of the former administering Power and involving nationals of the newly independent State. The predecessor State cannot continue to adjudicate cases henceforward falling under the judicial sovereignty of the successor State. Many agreements on this subject could be cited. See, for example, as regards France and the newly independent territories: Agreement concerning the transitional provisions in respect of justice between France and the Central African Republic of 12 July 1960 (*Journal officiel de la République Française, Lois et décrets* (Paris), 92nd year, No. 176 (30 July 1960), p. 7043, and *Materials on succession of*

63. There are many reasons for this. In the first place, decolonization cannot be total and instantaneous *ab initio*; rather, at least to begin with, it is purely nominal, and only gradually acquires more substance and reality, so that the question of archives seldom receives priority treatment during the early, almost inevitably superficial, stage of decolonization. Secondly, newly independent States are plunged straightaway into day-to-day problems and have to cope with economic or other priorities which absorb all their attention and prevent them from perceiving immediately the importance of archives for their own development. Thirdly, the under-development inherited in all fields by newly independent States is also reflected precisely in an apparent lack of interest in the exercise of any right to the recovery of archives. Lastly, and above all, the power relationships existing between the former administering Power and the newly independent State most often enables the former to evade the question of the transfer of archives and to impose unilateral solutions of its own choice in this respect. For all these reasons, and doubtless others besides, provisions relating to archives are absent from almost all independence agreements.

## 2. GENERAL PRINCIPLES CONCERNING SUCCESSION TO STATE ARCHIVES

### (a) *Restitution and co-operation*

64. In view, firstly, of the fearful complexity of the problem of archives, secondly of the pride of national leaders in matters of archives belonging to or concerning their respective countries, and finally of the acquisitive impulse of archivists of all countries, and

(Footnote 52 continued.)

*States in respect of matters other than treaties* (United Nations publication, Sales No. E/F.77.V.9), p. 150); Agreement between France and Chad of the same date (*Journal officiel de la République française* (*op. cit.*), p. 7044, and *Materials ...* (*op. cit.*), p. 157); Agreement between France and the Congo of the same date (*Journal officiel ...* (*op. cit.*), p. 7043, and *Materials ...* (*op. cit.*), p. 163); Agreement between France and Gabon of 15 July 1960 (*Journal officiel ...* (*op. cit.*), p. 7048, and *Materials ...* (*op. cit.*), p. 182); Agreement between France and Madagascar of 2 April 1960 (*Journal officiel ...* (*op. cit.*), 92nd year, No. 153 (2 July 1960), p. 5968, and *Materials ...* (*op. cit.*), p. 290); Agreement between France and the Federation of Mali of 4 April 1960 (*Journal officiel ...* (*op. cit.*), p. 5969, and *Materials ...* (*op. cit.*), p. 315); exchange of letters between France and Upper Volta of 24 April 1961 relating to the transfer of records pertaining to cases pending in the Conseil d'Etat and the Cour de cassation (*Journal officiel ...* (*op. cit.*), 94th year, No. 30 (5-6 February 1962), p. 1315, and *Materials ...* (*op. cit.*), p. 439); exchange of letters between France and Dahomey of 24 April 1961 (*Journal officiel ...* (*op. cit.*), p. 1285, and *Materials ...* (*op. cit.*), p. 128); exchange of letters between France and Mauritania of 19 June 1961 (*Journal officiel ...* (*op. cit.*), p. 1335, and *Materials ...* (*op. cit.*), p. 343); exchange of letters between France and Niger of 24 April 1961 (*Journal officiel ...* (*op. cit.*), p. 1306, and *Materials ...* (*op. cit.*), p. 372); exchange of letters between France and the Ivory Coast of 24 April 1961 (*Journal officiel ...* (*op. cit.*), p. 1269, and *Materials ...* (*op. cit.*), p. 231); and others.

until the still far-off time when the archives of all States are considered "a common heritage of mankind" accessible to all, the Commission might, if it considers it advisable, confine itself to establishing a general legal framework for succession to State archives, leaving the States concerned to find flexible solutions from case to case, in the light of all the special circumstances. However, the Commission cannot usefully suggest valid solutions, offering scope for co-operation among States, unless it takes account of the recommendations of the international organizations, in particular UNESCO, which reflect the *new, contemporary demands of States with regard to their right to archives and to their cultural heritage*.

65. More generally, the Commission should take fully into account the current of opinion now materializing, *quite apart from any question of State succession*, in support of promoting cultural exchanges among States and, in this context, facilitating access to the historical archives of countries for researchers from other countries or for the microfilming of archival collections by other interested States.<sup>53</sup> For example, Italy has concluded a considerable number of cultural agreements, some of which facilitate access to and, if necessary, the reproduction of Italian archives.<sup>54</sup>

66. It is perfectly clear—and this remark is relevant also to the study of disputes concerning archives in the

<sup>53</sup> There is, of course, also an Agreement on the importation of educational, scientific and cultural materials (with protocol), opened for signature at Lake Success, N.Y., on 22 November 1950, adopted under the aegis of UNESCO (United Nations, *Treaty Series*, vol. 131, p. 25).

<sup>54</sup> See *inter alia*, the Agreement of London (Italy/United Kingdom) of 8 November 1951, which provides for equal treatment for the access of research workers to documents; the Agreement of Rome (Italy/Netherlands) of 5 December 1951, concerning cultural co-operation; the Agreement of Rome (Italy/Austria) of 24 March 1952, on cultural co-operation; the Agreement of Rome (Italy/Spain) of 11 August 1955, on exchanges of documents and information; the Bonn Agreement (Italy/Federal Republic of Germany) of 8 February 1956, on the same subject; the Agreement of Rio de Janeiro (Italy/Brazil) of 6 September 1958, on the same subject; the Agreement of Rome (Italy/Iran) of 29 November 1958, to facilitate reciprocal access of researchers to archives and libraries; the Agreement of Moscow (Italy/USSR) of 9 February 1960 on exchanges of documents and information; the Agreement of Lima (Italy/Peru) of 8 April 1961, on the same subject; the Agreement of Buenos Aires (Italy/Argentina) of 12 April 1961, on the same subject; the Agreement of Rome (Italy/Somalia) of 26 April 1961, on the same subject; the Agreement of Bogota (Italy/Colombia) of 30 March 1963, on the same subject; the Agreement of Warsaw (Italy/Poland) of 26 March 1965, on the same subject; the Protocol of 21 September 1965 (Italy/Hungary), to facilitate the study of archival material in both countries; the Agreement of Rome (Italy and ten South American countries) of 1 June 1966, on exchanges of documents; the Agreement of Mexico City (Italy/Mexico) of 23 August 1966, on the same subject; the Agreement of Osimo (Italy/Yugoslavia) of 10 November 1975, on cultural co-operation.

succession of States—that *from the earliest times, every State has possessed archives of interest to every other State*. For example, most of the historical archives relating to Australia and its territories are kept in the United Kingdom. The historical archives of Argentina are to be found mainly in Spain, at the Archivo Histórico Nacional in Madrid, and in France, in the Manuscripts Department of the Bibliothèque Nationale, in Paris. Important archives concerning the history of Barbados from the fifteenth century are kept in Spain, the United States of America and the United Kingdom. Large collections of archives concerning the history of Belgium are kept in Austria, Spain, France, Luxembourg, the Netherlands and the Vatican. Historical archives concerning Brazil are to be found in Spain, Portugal, Italy, the United Kingdom, Sweden, Switzerland, Austria, the USSR and the United States of America. *Documents relevant to the study of the history of Bulgaria are scattered throughout 24 different countries*, including such newly independent States as Egypt, Tunisia and Morocco. The history of Canada owes much to collections of archives kept in France, the Vatican, the United Kingdom and the USSR. *Archives relating to the history of France are to be found in collections kept in a score of countries*, in particular, the Federal Republic of Germany, Belgium, Bulgaria, Canada, the Congo, Czechoslovakia, Greece, Italy, the Netherlands, Romania, Senegal, Sweden, the USSR, the United States of America, the Vatican and Yugoslavia. Archives relating to Poland can be found in the Federal Republic of Germany, Sweden, the United States of America and the United Kingdom. Important historical documents concerning the history of the United States of America, France and the United Kingdom are kept in Canada. In the Congo, the national archives of Brazzaville contain important collections concerning the former territories of French Equatorial Africa, and archives concerning the States which constituted former French West Africa are to be found in Dakar (Senegal), having been assembled there by France.<sup>55</sup>

67. Two conclusions can be drawn from the foregoing. Firstly, it is worth noting that (a) *every State can help every State in compiling the history of every State*, and (b) by so doing, can make all countries aware of their interdependence in respect of historical archives so that they will be capable, in the words of UNESCO, of “managing mankind’s knowledge” together.<sup>56</sup> However, the intricate interrelationships of

archive problems which this interdependence of States in the field of archives tends to suggest, cannot conceal the obvious fact that *it is the most developed States that can and should provide most assistance to the others*. It is not surprising that this should be so in the field of archives, since it is also perfectly clear in the field of development in general. Secondly, if such an identifiable trend towards archival co-operation among States exists today, thereby making the archives of some States more readily accessible to others which yet have no claim to the ownership thereof, *then a fortiori the claims of successor States to archives in which they do have a right of ownership, under the rules of the succession of States, can no longer be disregarded*.

(b) *Demythification of the problems concerning, disputes over archives*

68. In his intelligent study cited earlier, Kecskeméti calls for the demythification of the problems raised by disputes over archives. Referring first to States against which claims concerning archives are made, i.e. generally the *predecessor States*, he rightly points out that:

- (i) The transfer of originals, provided that it is legally justified and is carried out in accordance with archival principles, should not be regarded as a depletion of the national heritage.

While it is the duty of archivists to ensure the integrity of the national heritage, nevertheless, as regards archives, irregular accretions are just as contrary to the concept of integrity as are removals.

- (ii) Delaying tactics such as failure to communicate information can only prolong disputes. It is better to arrive at an agreement based on mutual trust, rather than to protract the dispute.
- (iii) Microfilming is not a panacea, but simply a technical process which makes it possible to copy the originals and to transport the copies easily and cheaply. The microfilming of all or part of document collections for countries so requesting, while it is a solution as far as providing access to documents is concerned, is nevertheless not a solution if the documents in question are legally part of the heritage of the requesting country. Microfilms can just as easily be produced for the purpose of being kept *in situ* after the transfer of the originals.<sup>57</sup>

69. One might add that the restitution of archives by the predecessor State (particularly those of a historical or cultural nature) undeniably comes up against difficulties, not the least of which is the psychological obstacle. As the Special Rapporteur has pointed out,<sup>58</sup> there is an incriminating aspect to the act of restitution, for it seems to imply that the holding of the archives by the predecessor State was unlawful. However, the *status quo* and the extension of the claim, which will inevitably grow with the passage of time, will make the holding of archives appear increasingly unlawful and intolerable.

<sup>55</sup> See C. Gut, “Constitution et reconstitution des patrimoines archivistiques nationaux”, and in particular “Éléments statistiques pour mesurer l’ampleur du problème”, C. Gut and M. Housseau (Dix-Septième Conférence internationale de la Table ronde des archives, 1977, report and appendix 1), which give an impressive survey of the archives concerning each State that are kept by other States. All the information contained in the foregoing paragraph is drawn from this rich report.

<sup>56</sup> UNESCO, *Thinking ahead: UNESCO today and the challenges of tomorrow* (Paris, 1977), p. 353.

<sup>57</sup> Kecskeméti, *loc. cit.*, para. 1.2.

<sup>58</sup> See para. 52 above.

70. So far as the *requesting States* are concerned, Kecskeméti attempts to demonstrate that their claims in respect of archives can be credible only if they are capable of guaranteeing the physical preservation of the archives. This argument, which is actually addressed to the newly independent States, carries no conviction, since, in the first place, it could provide predecessor States with the pretext which they often seek for refusing to return archives and, secondly, the recognition of a right in a certain property cannot be subordinated to the manner in which its titular owner may dispose of his property. Far sounder is the other argument put forward by the same writer, that

... documents which are the subject of dispute *are of concern to both parties*,\* since they are the product and testimony of a common history (predecessor States and successor States...).

*All negotiation begins with recognition of this mutual interest*,\* even if the two parties have different views on *the events* to which the documents relate and *the place* in which they should be kept.<sup>59</sup>

(c) *Obligation to negotiate and to settle disputes concerning archives*

71. The Commission has adopted a number of articles, some general, others specific to each type of State succession, but all of them proclaiming the principle of the transfer of movable and immovable goods to the successor State. It seems clear that as far as archives are concerned this principle of transfer is even more imperative, since while it may be possible to conceive of a State without a navy, for example, it is impossible to imagine one without archives; for together with other State property they constitute the elements which are the most essential and the most common—so much so that they can be said to be inherent in the State's very existence.

72. It follows that if, because of specific circumstances, the transfer of State archives to the successor State either did not take place or was only partially carried out, thus creating a dispute, the predecessor State and the successor State should be under a duty to negotiate in good faith and with unimpeachable determination to work out a satisfactory solution in order to settle the dispute over archives that has arisen. As the Director-General of UNESCO has said:

Because the patrimonial character of archives as State property derives from the basic sovereignty of the State itself, problems involved in the ownership and transfer of State archives are fundamentally legal in character. Such problems should therefore be resolved primarily through the negotiation and bilateral or multilateral negotiations and agreements between the States involved.<sup>60</sup>

(d) *Transfer of originals pursuant to the principle of the territorial origin of archives*

73. Archivists make a "distinction between archives

which are *organically* of interest to a country, constituting its *title deeds* (origin), and those which, while of some relevance to the country in question, for one reason or another do not belong to it, but simply relate to it (relevance)".<sup>61</sup> The first principle, known as the *principle of territorial origin*, applies in cases of the removal of archives from the territory affected by the succession of States. In theory, its application presents no major difficulties, since "in most cases of this type, the right of ownership is automatically determined by the reasons for and the date of the removal, as well as by the date of the establishment of the documents".<sup>62</sup>

74. It is in pursuance of the principle of the territorial origin that the successor State can be said to have the right to the restitution of archives of all kinds (historical, cultural, administrative) which "originate" from the territory or which, in other words, *belong* to it. These are archives which are linked to the territory. This is clearly the case, first, of all the administrative archives of the territory to which the succession of States relates. It is just as clearly the case of archives *antedating* the exercise of sovereignty by the (predecessor) State which had removed the archives—for example, historical archives dating from before the colonization of a territory and removed by the administering Power, or those which had been removed by the preceding successor State (which became the predecessor State in the most recent succession of States) in the case of the transfer of part of one State's territory to another State.

75. The principle of the territorial origin does not, however, constitute a criterion which is reliable in all circumstances for the allocation of archives to the successor State. In the case of decolonization, for example, so-called archives of sovereignty, with the aid of which the colonial Power conducted the political administration of the territory and which were kept in the capital of the territory before being removed to the metropolitan territory when the territory attained independence, should normally be governed by the principle of territorial origin. Such archives, originating from and of *organic* interest to the territory—the territory which was the reason for the creation of these archives and which has ensured their preservation—are not readily, to say the least, transferred to the newly independent State by the predecessor State.

(e) *Transfer of originals pursuant to the principle of functional connection of archives*

76. The administrative and technical archives of the territory affected by the succession of States pass to

<sup>61</sup> C. Laroche, "Les archives françaises d'outre-mer", *Comptes rendus mensuels des séances de l'Académie des sciences d'outre-mer, Séances des 4 et 18 mars 1966* (Paris), t. XXVI, vol. III (March 1966), p. 129.

<sup>62</sup> Kecskeméti, *loc. cit.*, para. 3.2.1.

<sup>59</sup> Kecskeméti, *loc. cit.*, para. 1.2.

<sup>60</sup> UNESCO, document 20 C/102 (*loc. cit.*), para. 19.

the successor State in pursuance of the principle of territorial origin, as explained above.<sup>63</sup> They also pass to the successor State pursuant to the *principle of functional connection*, which means that the States concerned are expected to do everything possible in order to ensure the satisfactory operation, regular functioning, normal management and administrative continuity of the territory affected by the succession of States. According to the principle of territorial origin, archives are transferred because they *belong* to the territory in question, whereas according to the principle of functional connection, archives *relating* to the territory may be transferred.

77. However, the application of the principle of the functional connection suffers from more overlapping and uncertainty than does the application of the principle of the territorial origin. An example is the case where the inhabitants of the territory involved leave it in order to settle definitively in the territory of the predecessor State, or where the territory ceded is divided among several successor States and the archives, kept in the capital of the transferred territory, are in the possession of the successor State to which the capital had been ceded. In these cases the archives in question have a functional "relevance" for all concerned. In such cases, the problem can only be resolved through the microfilming or reproduction of the originals. The preparation of substitute copies and their delivery to all the interested States make it possible to safeguard another principle, the one to which archivists rightly attach especial value: the principle of *respect for the integrity* of archival collections. And this brings us to yet one other principle, that of *common heritage*.

(f) *Concept of archives as a common heritage*

78. Consistent with the views of Kecskeméti, the Director-General of UNESCO sets forth this concept as follows:

Where an archives group or a body of archives results from the activity of an administration where succession is shared between the predecessor State and two or more successor States—i.e. where the archives form part of the national heritages of two or more States but cannot be divided without destroying its juridical, administrative, and historical value—as a realistic solution recourse should be had to the concept of *joint heritage*. The practical result of the application of this concept is that the archives group is left physically intact in one of the countries concerned, where it is treated as part of the national archival heritage, with all of the responsibilities with respect to security and handling implied thereby for the State acting as the owner and custodian of that heritage. The States sharing this joint heritage should then be given rights equal to those of the custodial State.<sup>64</sup>

As one can clearly perceive, this principle has evolved very satisfactorily from the need to reconcile the

"heritage" principle of archives with the principle of respect for the integrity of archival collections.

(g) *Principle of the territoriality of archives*

79. Over and above the respect due to what are known as the principles of territorial origin and of functional connection, another doctrine, that of the *territoriality of the archives*, gradually evolved from the practice of States, for it had become manifest in the course of practice that the above principles were by no means unambiguous and were open to various, not to say divergent, interpretations. The "territoriality" of the archives should be taken to denote the devolution of a territory's documents in such a way as to settle its rights, enable it to meet its obligations, preserve continuity in the administration of the territory, and protect the interests of the local population—in short, in a manner which will contribute to the *viability* of the territory to which the succession of States relates. But the meaning of the principle of territoriality should not, mistakenly, be construed narrowly, as the term might suggest. Archives have of course "*a natural purpose\* which is determined*", according to one author, "*by the territory to which they relate and in which they should, as far as possible, be preserved*. Archives have a useful purpose in that they serve the administration of their territories."<sup>65</sup> However, the principle of the territoriality of archives is not necessarily a mere physical criterion of geographical location; in other words, it does not simply mean the preservation *in situ* of the archives of the territory to which the succession of States relates. It should apply to archives which *concern* or *relate* to the territory as well as to those which *belong* to the territory. It is in this sense that the application of this principle has to be reconciled with the other principles—and that is not always easy.

80. Finally, in cases where the archival dispute arising from the succession of States is not settled by the application of any of the above principles, either singly or in combination, there are other solutions which may be used.

(h) *Subsidiary principles: right to a substitute copy and right to repairation*

(i) *Right to a substitute copy*

81. The right to a substitute copy is exercisable only in cases where it would be physically impossible to accede to the successor State's request for the originals of the State archives to which it might be entitled by virtue of the rules governing the succession of States. This situation arises where there are several successor States, or in cases where the mutilation of the integrity of the archival collection would appear to be most damaging. The development of techniques of *facsimile* or microfilm reproduction mentioned by the Special

<sup>63</sup> See para. 74.

<sup>64</sup> UNESCO, doc. 20 C/102 (*loc. cit.*), para. 25.

<sup>65</sup> Jacob, *op. cit.*, p. 10.



Rapporteur<sup>66</sup> makes this an easy solution, but raises the problem of who would defray the cost of these processes. To the Special Rapporteur, it seems clear that the predecessor State is bound to provide at its own expense any copy of a document of which it cannot transfer the original to which the successor State would be entitled.

(ii) *Right to reparation through delivery of documents of equivalent value*

82. A kind of "right to reparation" came into being through the treaty practice arising out of the peace treaties of 1947 which terminated the Second World War. The provisions of these treaties state that, if it should be impossible to restore certain archival collections or documents that are to be handed over, "objects of the same kind and of approximately equivalent value" are to be delivered.<sup>67</sup>

83. This solution has not found favour with certain archivists; for example, M. Bautier takes the view that an archival document is by definition irreplaceable, but he prefers, curiously enough, that substitutes should be made by microfilming process at the expense of the State which has to make good the wrong occasioned by the non-delivery of the original.<sup>68</sup> In some cases, archives have, in fact, inestimable historical value which is in any case independent of their "operational" value. Consequently, while the microfilm copy satisfies the researcher, it impoverishes the cultural and historical heritage. Only compensation of comparable historical value would appear to be just in such a case. This does not mean that microfilming does not serve a useful purpose. In this way, the twofold requirement of the historical value and the administrative value of the archive in question can be satisfied.

### 3. PROPOSALS FOR A DRAFT ARTICLE

84. After the foregoing analysis, the Commission may wish to consider a draft article of a general character on the transfer of archives to a successor State, applicable to *all types of State succession*. The draft article might be inserted in section 1 (General provisions) of part I (Succession of States to State property).<sup>69</sup> It would be based on article 9, which lays down the general principle of the passing of State property. Since, however, that article deals only with the transfer of State property "situated in the territory to which the succession of States relates", it would be usefully supplemented by the draft article on archives,

for archives are movable objects which might well no longer be physically present in the territory in question, having been removed by the predecessor State just before the date of the succession of States.

85. This, then, would be a reason of some weight for adopting a draft article in general terms setting forth a principle concerning the transfer of archives which, although modelled on article 9, would appropriately supplement it by a reference to property (archives) situated *outside* the territory to which the succession of States relates.

86. There is another reason why the Commission might wish to consider the drafting of a general article on the succession of State archives—the reason which, indeed, justifies this entire report on the subject: *archives, as State property, constitute a very specific case*. The principle of the transfer of State property taken *in abstracto* applies to all property, whether movable or immovable, and is applicable readily to concrete situations involving the transfer of such property as administrative premises or buildings of the State, barracks, arsenals, dams, military installations, all kinds of research centres, factories, manufacturing facilities, railway equipment, including both rolling stock and fixed installations, airfields, including their movable and immovable equipment and installations, claims outstanding, funds, currency, etc. By virtue of their nature, all these forms of State property are susceptible to appropriation and hence to assignment to the successor State, as appropriate, in keeping with the rules for the succession of States. *Such is not necessarily the case with archives, which, by virtue of their physical nature, their contents, and the function which they perform, may seem to be of interest at one and the same time to the predecessor State as well as to the successor State.*

87. Obviously, a State building situated in the territory to which the succession of States relates can only pass to the successor State or, where there is more than one successor State, to one of them subject to compensation awarded to the others. Similarly, monetary reserves—such as gold, for example—can be transferred *physically* to the successor State, or apportioned between the predecessor State and the successor State, or among several successors, if the one or other solution is agreed upon by the parties. There is nothing in the physical nature of State property of this kind that would stand in the way of any solution that is agreed upon by the States concerned.

88. Archives, by contrast, may prove to be *indispensable* both to the successor State and to the predecessor State, and owing to their nature they cannot be *divided* or *split up*. *However, State archives are objects which have the peculiarity of being reproducible, which is not true of the other fixed and movable property involved in the succession of States. Of all State property, archives alone are capable of being duplicated, which means that both the right of the successor State to recover the archives and the*

<sup>66</sup> See paras. 33–39 above.

<sup>67</sup> For example, Treaty of Peace with Italy, art. 75, para. 9 (United Nations, *Treaty Series*, vol. 49, p. 40).

<sup>68</sup> France, *Les archives dans la vie internationale* (op. cit.), p. 141.

<sup>69</sup> For the text of all the articles adopted by the Commission to date, see para. 3 above.

*interest of the predecessor State in their use can be satisfied.* This peculiarity of archives, as State property, seems to be sufficient reason for the adoption of a specific draft article.

89. If these considerations are thought sufficient to justify the adoption of a general article, it might be drafted on the following lines:

**Article A. Transfer of State archives**

1. Except as otherwise agreed or decided, and subject to the provisions of paragraph 3 below, State archives of whatever nature that relate exclusively or principally to the territory to which the succession of States relates, or that belong to that territory, shall pass to the successor State.

2. The successor State will permit any appropriate reproduction of the State archives that pass to it, for the purposes of the predecessor State [or of any interested third State].

3. Except as otherwise agreed or decided, the predecessor State will keep the originals of the State archives referred to in paragraph 1 above, if they are archives of sovereignty, subject to the proviso that it will authorize any appropriate reproduction thereof for the purposes of the successor State.

90. In the above draft, the Special Rapporteur has attempted to take into account all relevant elements of the problem. It will be observed that:

(a) Priority is given to *agreement between the parties*, which thus are free to agree upon any specific solution called for by special circumstances;

(b) In principle, State archives of whatever kind pass to the successor State;

(c) In particular, State archives which "belong" to the transferred territory pass to the successor State on the basis of the *principle of territorial origin*, or *a fortiori*, on the basis of the *patent reality*. For example, the archives in question may be old historical archives that were held in the transferred territory even *before* it came under the authority of the predecessor State, which authority has been extinguished by the succession of States. They may also be administrative archives proper to the transferred territory;

(d) The transfer also covers documents which have an *exclusive connection* with the territory. It is the *direct archives-territorial link* which prevails, pursuant to the principle of the territorial origin of the archives. Examples of this category are administrative

archives, known as "local" archives, situated in the territory to which the succession of States relates;

(e) The transfer covers furthermore documents which have a *principal connexion* with the territory. In this case, the documents have a stronger tie with the transferred territory than with that of the predecessor State. By reason of the respect for the integrity of the archival collections, which must not be mutilated, and the principle of the functional connection, these archives must pass to the successor State. These State archives which relate principally to the transferred territory may have been located at all times in the capital of the predecessor State or may have been removed from the transferred territory just before the date of the succession of States;

(f) In the latter case, however, concerning State archives relating principally to the transferred territory, the Special Rapporteur proposes that *political* archives known as "archives of sovereignty" should not pass to the successor State, though the latter may obtain any appropriate reproduction. This is the purpose of paragraph 3, which provides an *exception to the rule of transfer*, qualified however, by the right to obtain a substitute copy;

(g) Lastly, the principle of the transfer of State archives to the successor State has a counterpart in the predecessor State's right to obtain a substitute copy for its own purposes, and in this way, the predecessor State's cultural needs, or even merely administrative or technical needs, can be satisfied. It is possible to visualize a case where a portion of the population of the territory affected by the succession of States has decided to leave it and to settle in the territory of the predecessor State. Problems of administrative management concerning this part of the population can only be dealt with by the predecessor State to the extent that the successor State places at its disposal the archives which concern these nationals (such as registers of births, marriages and deaths). This is the reason why the Special Rapporteur has made provision, in paragraph 2, for the same right to obtain substitute copies for the benefit of any third State in whose territory a portion of the population of the transferred territory may have settled after the date of the succession of States. However, he has put this "right" of the third State in square brackets, in order to indicate his hesitation in this case.

91. The next task is to draft special provisions relating to State archives in respect of each type of succession of States. This is the object of chapter II.

## CHAPTER II

## Provisions peculiar to each type of succession of States with regard to State archives

## A. Transfer of part of a State's territory

92. We shall first consider the practice of States, without however losing sight of the fact that this practice derives above all from peace treaties, which are generally based not so much on equitable decisions as on political solutions reflecting the power relationship of victor and vanquished. We shall then try to draw some conclusions from this practice of States and outline proposals for more equitable solutions.

## 1. TRANSFER TO THE SUCCESSOR STATE OF ALL ARCHIVES RELATING OR BELONGING TO THE TRANSFERRED TERRITORY

## (a) Sources

93. This practice, about which there seems to be no doubt, originated a long time ago in territorial changes carried out as early as the Middle Ages. It is illustrated by examples taken from the history of France and Poland.<sup>70</sup> In France, King Philippe Auguste founded his "Repository of Charters" in 1194, which constituted a collection of the documents relating to his kingdom. When in 1271 King Philip III (the Bold) inherited the lands of his uncle, Alphonse de Poitiers (almost the entire south of France), he immediately transferred the archives relating to these lands to the Repository: title deeds to land, chartularies, letter registers, surveys and administrative accounts. This practice continued over the centuries as the Crown acquired additional lands. The same happened in Poland from the fourteenth century onwards during the progressive unification of the kingdom through the absorption of the ducal provinces: the dukes' archives passed to the King along with the duchies. Thus, the transfer principle has been applied for a very long time, even though, as we shall see, the reasons for invoking it varied.

## (b) Archives as evidence

94. Under the old treaties, archives were transferred to the successor State primarily as evidence and as titles of ownership. Under the feudal system, archives represented a legal title to a right. That is why the victorious side in a war made a point of removing the archives relating to their acquisitions, taking them from the vanquished enemy by force if necessary; their right to the lands was guaranteed only by the possession of the "terriers". An example of this is

<sup>70</sup> Cf. France, *Les archives dans la vie internationale* (op. cit.), pp. 12 et seq.

provided by the Swiss Confederates who, in 1415, *manu militari* removed the archives of the former Habsburg possessions from Baden Castle.<sup>71</sup>

## (c) Archives as instruments of administration

95. As from the sixteenth century, it came to be realized that while archives constituted an effective legal title they also represented a means of administering the country. It then became the accepted view that, in a transfer of territory, it was essential *to leave to the successor as viable a territory as possible* in order to avoid disruption of management and to facilitate proper administration. Two possible cases may arise:

## (i) Case of a single successor State

96. All administrative instruments are transferred from the predecessor State to the successor State, the said instruments being understood in the broadest sense: fiscal documents of all kinds, cadastral and domanial registers, administrative documents, registers of births, marriages and deaths, land registers, judicial and prison archives, etc. Hence it became customary to leave in the territory all the written, pictorial and photographic material necessary for the continued smooth functioning of the administration.

97. For example, in the case of the cession of the provinces of Jämtland, Härjedalen, Gottland and Ösel, the Treaty of Brömsebro of 13 August 1645 between Sweden and Denmark provided that all judicial deeds, registers and cadastral documents (article 29) as well as all information concerning the fiscal situation of the ceded provinces must be delivered to the Queen of Sweden. Similar provisions were subsequently accepted by the two Powers in their peace treaties of Roskilde (26 February 1658; article 10) and Copenhagen (27 May 1660; article 14).<sup>72</sup> Article 69 of the Treaty of Munster (30 January 1648) between the Netherlands and Spain provided that "all registers, maps, letters, archives and papers, as well as judicial records, *concerning* any of the United Provinces, associated regions, towns . . . which exist in courts, chancelleries, councils and chambers . . . shall be delivered . . .".<sup>73</sup> Under the Treaty of Utrecht (11 April 1713), Louis XIV ceded Luxembourg, Namur and

<sup>71</sup> As these archives concerned not only the Confederates' territories but also a large part of South-West Germany, in 1474 the Habsburgs of Austria were able to recover the archives not concerned with Confederate territory.

<sup>72</sup> France, *Les archives dans la vie internationale* (op. cit.), p. 16.

<sup>73</sup> *Ibid.*

Charleroi to the (Netherlands) States General "with all papers, letters, documents and archives relating to the said Low Countries".<sup>74</sup>

98. Almost all treaties concerning the transfer of part of a territory, in fact, contain a clause relating to the transfer of archives, and for this reason it is impossible to list them all. Some treaties are even accompanied by a separate convention dealing solely with this matter. Thus, the Convention between Hungary and Romania signed at Bucharest on 16 April 1924,<sup>75</sup> which was a sequel to the peace treaties marking the end of the First World War, dealt with the exchange of judicial records, land registers and registers of births, marriages and deaths, specifying how the exchange was to be carried out.

(ii) *Case of more than one successor State*

99. The examples given below concern old and isolated cases and cannot be taken to indicate the existence of a custom, but the Special Rapporteur felt it useful to mention them because the approach adopted would today be rendered very straightforward through the use of modern reproduction techniques.

100. Article 18 of the Barrier Treaty of 15 November 1715, concluded between the Holy Roman Empire, England and the United Provinces, provides that the archives of the dismembered territory, Gelderland, would not be divided among the successor States but that an inventory would be drawn up, one copy of which would be given to each State, and the archival collection would remain intact and at their disposal for consultation.<sup>76</sup> Similarly, article VII of the Treaty concluded between Prussia and Saxony on 18 May 1815<sup>77</sup> refers to "deeds and papers which . . . are of common interest to both parties". The solution adopted was that Saxony would keep the originals and provide Prussia with certified copies.

101. Thus, regardless of the number of successors, the entire body of archives remained intact in pursuance of the principle of the conservation of collections for the sake of facilitating administrative continuity. However, this same principle and this same concern were to give rise to many disputes in modern times as a result of a distinction made between administrative archives and historical archives.

(d) *Archives: historical fund or cultural heritage*

102. According to some writers, administrative archives must be transferred to the successor State in

their entirety, while so-called historical archives, in conformity with the principle of the integrity of the archival collection, must remain part of the heritage of the predecessor State unless they were established in the transferred territory through the normal functioning of its own institutions. This argument, although not without merit, is not supported by practice: history has seen many cases of transfers of archives, historical documents included.

103. For example, article 18 of the Treaty of Vienna (3 October 1866) by which Austria ceded Venezia to Italy provides for the transfer to Italy of all "title deeds, administrative and judicial documents . . ., *political and historical documents\** of the former Republic of Venice", while each of the two parties undertakes to allow the others to copy "*historical\** and political documents which may concern the territories remaining in the possession of the other Power and which, in the interests of science, cannot be separated from the archives to which they belong".<sup>78</sup>

104. Other examples of this are not difficult to find. Article 29, paragraph 1 of the Peace Treaty between Finland and the FRSR signed at Dorpat on 14 October 1920 provides that:

The contracting parties undertake to return as soon as possible archives and documents which belong to public administrations and institutions, which are situated in their respective territories and which concern solely or largely the other contracting party or its history.<sup>79</sup>

2. ARCHIVES REMOVED FROM OR CONSTITUTED OUTSIDE THE TRANSFERRED TERRITORY

105. There would seem to be ample justification for accepting as adequately reflecting the practice of States the rule whereby the successor State is given all the archives, historical or other, relating or belonging to the transferred territory, even if these archives have been removed from or are situated outside this territory.

106. The Treaties of Paris (1814) and of Vienna (1815) provided for the return to their place of origin of the State archives that had been gathered together in Paris during the Napoleonic period.<sup>80</sup> Under the Treaty of Tilsit (7 July 1807), Prussia, having returned that part of Polish territory which it had conquered, was obliged to return to the new Grand Duchy of Warsaw not only the current local and regional archives relating to the restored territory but also the relevant State documents ("Berlin Archives").<sup>81</sup>

<sup>74</sup> *Ibid.* p. 17.

<sup>75</sup> League of Nations, *Treaty Series*, vol. XLV, p. 331.

<sup>76</sup> France, *Les archives dans la vie internationale (op. cit.)*, pp. 17-18.

<sup>77</sup> G.F. de Martens, ed., *Nouveau Recueil de Traités* (Göttingen, Dieterich, 1887), vol. II (1814-15), repr., p. 276.

<sup>78</sup> France, *Les archives dans la vie internationale (op. cit.)*, p. 27.

<sup>79</sup> League of Nations, *Treaty Series*, vol. III, p. 25.

<sup>80</sup> France, *Les archives dans la vie internationale (op. cit.)*, pp. 19-20. See also paras. 27-29 above.

<sup>81</sup> France, *Les archives dans la vie internationale (op. cit.)*, p. 20.

107. In the same way, Poland recovered the central archives of the former Polish State which had been transferred to Russia at the end of the eighteenth century, as well as those of the former autonomous Kingdom of Poland for the period 1815–1863 and the following period up to 1876. It also obtained the documents of the Office of the Secretary of State for the Kingdom of Poland (which acted as the central Russian administration at St. Petersburg from 1815 to 1863), those of the Tsar's Chancellery for Polish Affairs, and lastly, the archival collection of the Office of the Russian Ministry of the Interior responsible for agrarian reform in Poland.<sup>82</sup>

108. Reference can also be made, in addition to the examples given in the Special Rapporteur's previous reports, to the case of the Schleswig archives. Under the Treaty of Vienna of 30 October 1864, Denmark had to cede the three duchies of Schleswig, Holstein and Lauenberg. Article 20 of the said treaty provided as follows: "title deeds, administrative documents and documents relating to civil justice that concern the ceded territories and are part of the archives of the Kingdom of Denmark" will be transferred, along with "all parts of the archives of Copenhagen that belonged to the ceded duchies and were taken from their archives".<sup>83</sup>

109. For a more detailed examination of this practice of States (although, in general, it would be wrong to attach too much importance to peace treaties, where solutions are based on a given "power relationship"), a distinction can be made between two cases, namely that of archives removed or taken from the territory in question and that of archives constituted outside that territory but relating directly to it.

(a) *Archives which have been removed*

110. Current practice seems to acknowledge that archives which have been removed by the predecessor State, either immediately before the transfer of sovereignty or even at a much earlier period, should be returned to the successor State. There is a striking similarity in the wording of the instruments which terminated the wars of 1870 and of 1914. Article 3 of the Treaty of Peace between France and Germany signed at Frankfurt on 10 May 1871 provided as follows:

If any of these items [archives, documents, registers, etc.] had been removed, they will be restored by the French Government on the demand of the German Government.<sup>84</sup>

This statement of the principle that archives which have been removed must be returned was later incorporated, in the same wording, in article 52 of the

Treaty of Versailles (28 June 1919), the only difference being that in that treaty it was Germany that was compelled to obey the law of which it had heartily approved when it was the victor.<sup>85</sup>

111. Similar considerations prevailed in the relations between Italy and Yugoslavia. Italy was to restore to the latter administrative archives relating to the territories ceded to Yugoslavia under the Treaty of Rapallo (12 November 1920) and the Treaty of Rome (27 January 1924) which had been removed by Italy between 4 November 1918 and 2 March 1924 as the result of the Italian occupation, and also deeds, documents, registers and the like belonging to those territories which had been removed by the Italian Armistice Mission operating in Vienna after the First World War.<sup>86</sup> The agreement between Italy and Yugoslavia of 23 December 1950 is even more specific: article 1 provides for the return to Yugoslavia of all archives "which are in the possession or which will come into the possession" of the Italian State, of local authorities, of public institutions and publicly-owned companies and associations", and adds that "should the material referred to *not be in Italy*," the Italian Government shall endeavour to recover and deliver it to the Yugoslav Government".<sup>87</sup>

112. However, some French writers of an earlier era seemed for a time to accept a contrary rule. Referring to partial annexation, which in those days was the most common type of State succession, owing to the frequent changes in the political map of Europe, Despagnet wrote: "The dismembered State retains . . . archives relating to the ceded territory which are preserved in a repository situated outside that territory".<sup>88</sup> Fauchille did not go so far as to support this contrary rule, but implied that distinctions could be drawn: if the archives are outside the territory affected by the change of sovereignty, exactly which of them must the dismembered State give up? As Fauchille put it:

Should it hand over only those documents that will provide the annexing Power with a means of administering the region, or also documents of a purely historical nature?<sup>89</sup>

113. The fact is that these writers hesitated to support the generally accepted rule and even went so far as to formulate a contrary rule because they accorded excessive weight to a court decision which

<sup>85</sup> Part III, sect. V, art. 52, concerning Alsace-Lorraine (*ibid.* (Leipzig, Weicher, 1923), 3rd series, vol. XI, pp. 380–381).

<sup>86</sup> Art. 12 of the Treaty of Peace with Italy of 10 February 1947 (United Nations, *Treaty Series*, vol. 49, p. 134). For the Rapallo Treaty, see League of Nations, *Treaty Series*, vol. XVII, p. 387; for the Rome Treaty, *ibid.*, vol. XXIV, p. 31.

<sup>87</sup> United Nations, *Treaty Series*, vol. 171, p. 293.

<sup>88</sup> F. Despagnet, *Cours de droit international public*, 4th ed. (Paris, Sirey, 1910), p. 128, para. 99.

<sup>89</sup> P. Fauchille, *Traité de droit international public* (8th edition of *Manuel de droit international public* by H. Bonfils) (Paris, Rousseau, 1922), vol. I, part 1, p. 360, para. 219.

<sup>82</sup> *Ibid.*, pp. 35–36.

<sup>83</sup> *Ibid.*, p. 26.

<sup>84</sup> G. F. de Martens, ed., *Nouveau Recueil général de traités* (Gottingen, Dieterich, 1874), vol. XIX, p. 689.

was not only an isolated instance but also bore the stamp of the political circumstances of the time. This was a judgement rendered by the Court of Nancy on 16 May 1896, after Germany had annexed Alsace-Lorraine, ruling that:

the French State, which prior to 1871 had an imprescriptible and inalienable right of ownership over all these archives, was in no way divested of that right by the change of nationality imposed on a part of its territory.<sup>90</sup>

It should be noted that the main purpose in this case was not to deny Germany (which was not a party to the proceedings) a right to the archives belonging to the territories under its control at that time, but to deprive an individual of public archives which were improperly in his possession.<sup>91</sup> Hence the scope of this isolated decision, which appeared to leave to France the right to claim from individuals archives which should or which might fall to Germany, seems to be somewhat limited.

114. The Special Rapporteur has nevertheless mentioned this isolated school of thought because it seemed to prevail, at least for some time and in some cases, in French diplomatic practice. If we are to give credence to at least one interpretation of the texts, this practice seems to indicate that only *administrative archives* should be returned to the territory affected by the change of sovereignty, while historical documents relating to that territory which are situated outside of it or are removed from it remain the property of the predecessor State. For example, the Treaty of Zurich (10 November 1859) between France and Austria provided that archives containing titles to property and documents concerning administration and civil justice relating to the territory ceded by Austria to the Emperor of the French "which may be in the archives of the Austrian Empire", including those at Vienna, should be handed over to the commissioners of the new Government of Lombardy.<sup>92</sup> If there is justification for interpreting in a very strict and narrow way the expressions used—which apparently refer only to *items relating to current administration*—it may be concluded that the *historical part* of the imperial archives at Vienna relating to the ceded territories was now affected.<sup>93</sup>

<sup>90</sup> Judgement of the Court of Nancy of 16 May 1896, case of *Dufresne v. the State* (M. Dalloz et al., *Recueil périodique et critique de jurisprudence, de législation et de doctrine, 1896* (Paris, Bureau de la jurisprudence générale, 1896) part 2, p. 412.

<sup>91</sup> The decision concerned 16 cartons of archives which a private individual had deposited with the archivist of Meurthe-et-Moselle. They related both to the ceded territories and to territories which remained French, and this provided a ground for the Court's decision.

<sup>92</sup> Art. 15 of the Franco-Austrian peace treaty signed at Zurich on 10 November 1859 (France, *Archives diplomatiques, Recueil de diplomatie et d'histoire* (Paris, Aymot, 1861), vol. I, p. 10; M. de Clercq, *Recueil des traités de la France* (Paris, Durand et Pedone-Lauriel, 1880), vol. VII (1856–1859), p. 647).

<sup>93</sup> For this viewpoint, see G. May, "La saisie des archives du département de la Meurthe pendant la guerre de 1870–1871", *Revue générale de droit international public* (Paris), vol. XVIII

115. Article 2 of the Treaty of the same date between France and Sardinia<sup>94</sup> refers to the aforementioned provisions of the Treaty of Zurich, while article 15 of the Treaty concluded between Austria, France and Sardinia on the same date reproduces them word for word.<sup>95</sup> Similarly, a convention between France and Sardinia signed on 23 August 1860 pursuant to the Treaty of Turin of 24 March 1860, confirming the cession of Savoy and the County of Nice to France by Sardinia, includes an article 10, which is cast in the same mould as the articles cited above when it states:

Any archives containing titles to property and any administrative, religious and civil justice documents relating to Savoy and the administrative district of Nice which may be in the possession of the Sardinian Government shall be handed over to the French Government.<sup>96</sup>

116. The Special Rapporteur is somewhat hesitant to conclude that these texts contradict the existence of a rule permitting the successor State to claim all archives, including historical archives relating to the territory affected by the change of sovereignty, which are situated outside that territory. Would it, after all, be very rash to interpret the words "titles to property" in the formula "titles to property, administrative, religious and judicial documents", which is used in all these treaties, as alluding to historical documents (and not only administrative documents) that prove the ownership of the territory? The fact is that in those days, in the Europe of old, the territory itself was the property of the sovereign, so that all titles tracing the history of the region concerned and providing evidence regarding its ownership were claimed by the successor. If this view is correct, the texts mentioned above, no matter how isolated, do not contradict the rule concerning the general transfer of archives, including historical archives, situated outside the territory concerned. If the titles to property meant only titles to public property, they would be covered by the words "administrative and judicial documents". Such an interpretation would seem to be supported by the fact that these treaties usually include a clause which appears to create an exception to the transfer of all historical documents, in that private documents relating to the reigning house, such as marriage contracts, wills, family mementoes, and so forth, are excluded from the transfer.<sup>97</sup>

(1911), p. 35; and *idem, Le Traité de Francfort* (Paris, Berger-Levrault, 1909), p. 269, footnote 2.

<sup>94</sup> Art. 2 of the Treaty between France and Sardinia concerning the cession of Lombardy, signed at Zurich on 10 November 1859 (France, *Archives diplomatiques* (*op. cit.*), p. 14; and de Clercq, *op. cit.*, p. 652).

<sup>95</sup> Art. 15 of the Treaty between Austria, France and Sardinia, signed at Zurich on 10 November 1859 (France, *Archives diplomatiques* (*op. cit.*), pp. 22–23; de Clercq, *op. cit.*, pp. 661–662).

<sup>96</sup> de Clercq, *op. cit.*, vol. VIII (1860–1863), p. 83; de Martens, ed., *Nouveau Recueil général de traités* (Gottingen, Dieterich, 1869), vol. XVII, part II, p. 25.

<sup>97</sup> Art. 10 of the Convention of 23 August 1860 between France and Sardinia (see note 96 above) provided that France

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

*all archives, historical and administrative, prior to 1860, which concern the territory ceded\* to France under the Treaty of 24 March 1860 and the Convention of 23 August 1860.*<sup>98</sup>

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

(b) *Archives established outside the territory*

119. This section concerns items and documents that relate to the territory involved in the succession of States but that have been established and have always been kept outside this territory. Many treaties include this category among the archives that must revert to the successor State. As mentioned above,<sup>99</sup> under the Peace Treaty of 1947 with Italy, France was able to obtain archives relating to Savoy and Nice established by the city of Turin. Under the Peace Treaty of 1947 with Hungary, Yugoslavia obtained all the eighteenth-century archives concerning Illyria that had been kept by Hungary.<sup>100</sup> Under the Craiova agreement of 7 September 1940 between Bulgaria and Romania concerning the cession by Romania to Bulgaria of the Southern Dobruja, Bulgaria obtained, in addition to the archives in the ceded territory, certified copies of the documents being kept in Bucharest and relating to the region newly acquired by Bulgaria.

120. What happens if the archives relating to the territory affected by the change in sovereignty are

(Footnote 97 continued.)

was to *return* to the Sardinian Government "titles and documents relating to the royal family", which implies that France had already taken possession of them together with the other historical archives. This clause relating to private papers, which is based on the dictates of courtesy, is also included, for example, in the Treaty of 28 August 1736 between France and Austria concerning the cession of Lorraine, article 16 of which left to the Duke of Lorraine family papers such as "marriage contracts, wills and other papers".

<sup>98</sup> United Nations, *Treaty Series*, vol. 49, p. 132.

<sup>99</sup> Para. 117 above.

<sup>100</sup> Art. 11 of the Peace Treaty with Hungary of 10 February 1947 (United Nations, *Treaty Series*, vol. 41, p. 178).

situated neither within the frontiers of this territory nor in the predecessor State? Article 1 of the agreement between Italy and Yugoslavia signed at Rome on 23 December 1950 provides that,

should the material referred to not be in Italy, the Italian Government *shall endeavour\** to recover and deliver it to the Yugoslav Government.<sup>101</sup>

In other words, to use terms dear to French civil law experts, what is involved here is not so much an "obligation of result" as an "obligation of means".<sup>102</sup>

121. The rule concerning the transfer to the successor State of archives relating to a part of another State's territory is taken to be so obvious that there is no risk of its being jeopardized by the lack of references to it in agreements. This is the view of one writer, who states:

Since the delivery of public archives relating to the ceded territories is a necessary consequence of annexation, it is hardly surprising that in many treaties of annexation there is no clause concerning this *obligation\**. It is implied, for it follows from the renunciation by the ceding State of all its rights and titles in the ceded territory.<sup>103</sup>

The terminology used has aged, and annexation itself is obsolete. However, the idea on which the rule is based is still valid, the object being, according to the same author, to "provide (the successor State) with whatever is necessary or useful for the administration of the territory".<sup>104</sup>

<sup>101</sup> *Ibid.*, vol. 171, p. 292.

<sup>102</sup> There are other cases in history of the transfer to the successor State of archives constituted outside the territory involved in the succession of States. These examples do not fall into any of the categories provided for in the system used here for the succession of States, since they concern changes in colonial overlords. These outdated examples are mentioned here solely for information purposes. (In old works, they were regarded as transfers of part of a territory from one State to another or from one colonial empire to another.)

The protocol concerning the return by Sweden to France of the Island of St. Barthélemy in the West Indies states that:

"papers and documents of all kinds relating to the acts [of the Swedish Crown] that *may be in the hands of the Swedish administration\** . . . shall be delivered to the French Government" (art. 3, para. 2 of the Protocol of Paris of 31 October 1877 annexed to the Treaty between France and Sweden signed at Paris on 10 August 1877 (de Martens, ed., *Nouveau recueil général de traités*, 2nd series (Göttingen, Dieterich, 1879), vol. IV, p. 368).

In section VIII of the Treaty of Versailles, concerning Shantung, art. 158 obliges Germany to return to Japan the archives and documents relating to the Kiaochow territory "*wherever they may be\**". (*British and Foreign State Papers, 1919*, vol. CXII (London, H.M. Stationery Office, 1922) p. 81.)

Article 1 of the Convention between the United States and Denmark of 4 August 1916, concerning the cession of the Danish West Indies, awards to the United States any archives in Denmark concerning these islands (for reference, see footnote 14 above), just as article VIII of the Treaty of Peace between Spain and America of 10 December 1898 had already given the United States the same right with regard to archives in Spain relating to Cuba, Puerto Rico, the Philippines and the island of Guam (Malloy, *Treaties, Conventions, International Acts . . . (op. cit.)*, p. 1693).

<sup>103</sup> Jacob, *op. cit.*, p. 11.

<sup>104</sup> *Ibid.*

## 3. THE "ARCHIVES-TERRITORY" LINK

122. As has been mentioned above, State practice shows that the link between archives and the territory to which the succession of States relates is taken very broadly into account. But the nature of this link should be made quite clear. Expert archivists generally uphold two principles, that of *territorial origin* and that of *territorial or functional connection*, each of which is subject to various and even different interpretations, leaving room for uncertainties.

123. What seems to be obvious is that the successor State cannot claim just any archives; it can claim only those that relate exclusively or principally to the territory. But what does "relate to" cover? The term may be construed in two ways.

124. First, there are archives which were acquired before the succession of States, either by or on behalf of the territory, against payment or free of cost, and with funds of the territory or otherwise.<sup>105</sup> From this first standpoint, such archives "belong" to the territory and must follow its destiny on the succession of States. In order to do so, it is not necessary that the archives should relate to the territory, since it is quite conceivable that the latter may have acquired, free of cost or against payment, historical, cultural or other documents concerning other parts of the world.

125. Secondly, the organic link between the territory and the archives relating to it must be taken into account.<sup>106</sup> However, a difficulty arises when the strength of this link has to be appraised by category of archives. Writers agree that, where the documents in question "relate to the predecessor State as a whole and . . . refer only incidentally to the ceded territory", they "remain the property of the predecessor State, [but] it is generally agreed that copies of them shall be furnished to the annexing State at its request".<sup>107</sup> The "archives-territory" link was specifically taken into account in the aforementioned Rome Agreement of 23 December 1950 between Yugoslavia and Italy concerning archives.<sup>108</sup>

<sup>105</sup> Article 11 of the Treaty of Peace of 1947 with Hungary (see footnote 100 above) rightly states, in para. 2, that the successor States, Yugoslavia and Czechoslovakia, shall have no right to archives or objects "acquired by purchase, gift or legacy" or to "original works of Hungarians".

<sup>106</sup> Under the Treaty of Peace of 1947, in art. 11. para. 1 (see footnote 100 above), Hungary handed over to the successor States, Czechoslovakia and Yugoslavia, objects "constituting [their] cultural heritage [and] which originated in those territories\* . . .".

<sup>107</sup> C. Rousseau, *Droit international public*, (Paris, Sirey, 1977), vol. III, p. 384. Cf. also, D. P. O'Connell, *State Succession in Municipal Law and International Law* (Cambridge, University Press, 1967), vol. 1: *Internal Relations*, pp. 232-233.

<sup>108</sup> Article 6 of the Agreement (see footnote 87 above) provides that archives which are indivisible or of common interest to both parties

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

126. Attention is drawn at this point to the decision of the Franco-Italian Conciliation Commission which held that archives and historical documents, even if they belonged to a municipality whose territory was divided by the new frontier drawn in the Treaty of Peace with Italy, must be assigned in their entirety to France, the successor State, whenever they related to the ceded territory.<sup>109</sup>

127. As was mentioned in an earlier context by the Special Rapporteur, after the Franco-German war of 1870 the archives of Alsace-Lorraine were handed over to the German successor State. However, the problem of the archives of the Strasbourg educational district and of its schools was amicably settled by means of a special convention. In this case, however, the criterion of the "archives-territory" link was applied only the case of documents considered to be "of secondary interest to the German Government".<sup>110</sup>

## 4. SPECIAL OBLIGATIONS OF THE SUCCESSOR STATE

128. The practice of States shows that many treaties impose upon the successor State an essential obligation which constitutes the normal counterpart of the predecessor State's duty to transfer all archives to the successor State. Territorial changes are often accompanied by population movements (new frontier lines which divide the inhabitants on the basis of a right of option, for instance). Obviously this population cannot be governed without, at least, administrative archives. Consequently, in cases where archives pass to the successor State by agreement, it cannot refuse to deliver to the predecessor State, upon the latter's request, any copies it may need. Any expense involved must of course be defrayed by the requesting State. (It

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*or the number of persons, institutions or companies to which these documents relate.\** In this case, the other Party shall receive a copy of such documents, which shall be handed over to it by the Party holding the original".

<sup>109</sup> Decision No. 163, rendered on 9 October 1953 (United Nations, *Reports of International Arbitral Awards*, vol. XIII, (United Nations publication, Sales No. 64.V.3) p. 503). This decision includes the following passage:

"Communal property which shall be so apportioned pursuant to paragraph 18 [of annex XIV to the Treaty of Peace with Italy] should be deemed not to include 'all relevant archives and documents of an administrative character or historical value'; such archives and documents, even if they belong to a municipality whose territory is divided by a frontier established under the terms of the Treaty, pass to what is termed the successor State if they concern the territory ceded or relate to property transferred\* (annex XIV, para. 1); if these conditions are not fulfilled, they are not liable either to transfer under paragraph 1 or to apportionment under paragraph 18, but remain the property of the Italian municipality. *What is decisive, in the case of property in a special category of this kind, is the notional link with other property or with a territory\** (ibid., pp. 516-517).

<sup>110</sup> Convention of 26 April 1872, signed at Strasbourg (de Martens, ed., *Nouveau Recueil général de traités* (Göttingen, Dieterich, 1875), vol. XX, p. 875).



might be useful to extend this possibility even to a third State, since the latter may receive populations which originate from the territory affected by the succession and which constitute a relatively large minority in that third State).

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

130. The successor State is sometimes obliged, by treaty, to preserve carefully certain archives which may be of interest to the predecessor State in the future. The aforementioned convention of 4 August 1916 between the United States of America and Denmark providing for the cession of the Danish West Indies stipulates in the third paragraph of article 1 that:

... archives and records shall be carefully preserved, and authenticated copies thereof, as may be required shall be at all times given to the ... Danish Government, ... or to such properly authorized persons as may apply for them.<sup>111</sup>

#### 5. TIME-LIMITS FOR HANDING OVER THE ARCHIVES

131. These time-limits vary from one agreement to another. The finest example of the speed with which the operation can be carried out is undoubtedly to be found in the Treaty of 26 June 1816 between the Netherlands and Prussia, article XLI of which provides that:

... archives, maps and other documents ... shall be handed over to the new authorities at the same time as the territories themselves.<sup>112</sup>

#### 6. STATE LIBRARIES

132. Already in his third report the Special Rapporteur explained how difficult it was to find information about the transfer of libraries.<sup>113</sup>

Three peace treaties signed after the First World War nevertheless expressly mentioned that libraries must be restored at the same time as archives. The instruments in question are the Treaty of Moscow (11 August 1920) between the RSFSR and Latvia, art.

11;<sup>114</sup> the Treaty of Moscow (12 July 1920) between the RSFSR and Lithuania, art. 9;<sup>115</sup> and the Treaty of Riga (18 March 1921) between Poland, the RSFSR and the Ukraine, art. 11, para. 1.<sup>116</sup> In those treaties the following formula is used:

The Russian Government shall at its own expense restore to ... and return to the ... Government *all libraries,\** records, museums, works of art, educational material, documents and other property of educational and scientific establishments, *Government,\** religious and communal *property\** and property of incorporated institutions, in so far as such objects were removed from ... territory during the world war of 1914–1917, and in so far as they are or may be actually in the possession of the Governmental or Public administrative bodies of Russia.

#### 7. CONCLUSIONS TO BE DRAWN FROM THE PRACTICE OF STATES AND PROPOSALS FOR A DRAFT ARTICLE

133. The conclusions and solutions to which this study of State practice gives rise would not appear to provide very promising material on which to base a proposal for an acceptable draft article on the problem of succession to State archives in the event of the transfer of part of a State's territory to another State. There are many reasons why the solutions adopted in treaties cannot be taken as an absolute and literal model for dealing with this problem in our draft article:

(a) First, it is clear that *peace treaties are almost inevitably an occasion for the victor to impose on the vanquished solutions which are most advantageous for the former*. Germany, the victor in the Franco-German war of 1870, dictated its law as regards the transfer of archives relating to Alsace–Lorraine right until 1919, when France, in turn, was able to dictate its own law for the return of those same archives, as well as others, relating to the same territory. History records a great many instances of such reversals, involving first the break-up and later the reconstitution of archive collections, or, at best, global and massive transfers one day in one direction and the next day in the other.

(b) *The solutions offered by practice are not very subtle nor always equitable*. In practice, decisions concerning the transfer to the successor State of archives of every kind—whether as documentary evidence, instruments of administration, historical material or cultural heritage—are made without sufficient allowance for certain pertinent factors. It is true that in many cases of the transfer of archives, including central archives and archives of an historical character relating to the ceded territory, the predecessor State was given an opportunity to take copies of these archives.

(c) As regards this type of succession one should bear in mind the general provisions of the articles already adopted, lest the solutions chosen conflict, without good reason, with those general provisions.

<sup>111</sup> For reference, see footnote 14 above.

<sup>112</sup> de Martens, ed., *Nouveau Recueil de traités* (Göttingen, Dieterich, 1877), vol. III (1808–1818) (reprint), p. 41.

<sup>113</sup> *Yearbook* ... 1970, vol. II, p. 161, document A/CN.4/226, part two, paras. (47) *et seq.* of the commentary to article 7.

<sup>114</sup> League of Nations, *Treaty Series*, vol. II, p. 221.

<sup>115</sup> *Ibid.*, vol. III, p. 129.

<sup>116</sup> *Ibid.*, vol. VI, p. 139.

134. In this connection, reference is made to draft *article 9*, which lays down a general principle concerning the passing of State property *in abstracto*. That article reads as follows:

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

Another pertinent provision is that in *article 12*, paragraph 1 of which places the emphasis on the *agreement* between the predecessor State and the successor State, and paragraph 2(b) of which states that, in the absence of such an agreement,

*movable\** State property of the predecessor State *connected with the activity\** of the predecessor State *in respect of the territory\** to which the succession of States relates shall pass to the successor State.

135. As regards the application of these provisions to the case of archives, in the event of the transfer of part of a State's territory, these various provisions combined produce the following result: (a) *The general principle is that State archives situated in the transferred territory pass to the successor State*; (b) *it is sound practice that the passing of such archives should be settled by agreement*; and (c) *it is recognized that in the absence of an agreement at least the archives connected with the activity of the predecessor State in respect of the territory transferred pass to the successor State*.

136. Actually, when adopting article 9, the Commission was thinking mainly of *immovable* property which, by its very nature, perforce remains in the part of the territory transferred and hence is bound to pass to the successor State. If the article were applied to *movable* property, it might well be nothing more than a specious tribute to ingenuousness and naïveté or an inducement to the predecessor State to take away the movable property. Applied to archives, article 9 would mean that the successor State will receive only those archives that it happens to find in the territory transferred to it.

137. It should not be forgotten that, in the view of the Commission, *the type of succession referred to here concerns the transfer of a small portion of territory*. The problem of State archives where part of a territory is transferred may be stated in the following terms:

(a) State archives of every kind that have a direct and necessary link with the management, administration and development of the part of the territory transferred must unquestionably pass to the successor State. The basic principle is that the part of territory concerned must be transferred to the successor State *in an irreproachable condition of viability*. Two possible cases may arise:

(i) State archives which were *situated in the transferred territory*, such as the archives constituted *locally* by the predecessor State for the purpose of administering the part of the

territory in question, must pass to the successor State. This is the obvious, wise and equitable solution. It may happen, however, that in consequence of the transfer of a part of one State's territory to another State, some or many of the inhabitants, preferring to retain their nationality, leave that territory and settle in the other part of the territory which remains under the sovereignty of the predecessor State. The State archives that were situated in the transferred territory, such as taxation records or records of births, marriages and deaths, concern these transplanted inhabitants. It will then be for the predecessor State to ask the successor State for all facilities, such as microfilming, in order to obtain the archives necessary for administrative operations relating to its evacuated nationals. In no case, however, inasmuch as it is a minority of the inhabitants which emigrates, may the successor State be deprived of the archives necessary for administrative operations relating to the majority of the population which stays in the transferred territory.

(ii) The second case concerns *State archives which are not and never have been situated in the part of territory transferred, but which have a direct and necessary link with the management, administration and development* of that part of the territory. For example, if a predecessor State which is highly centralized has built up a large collection of central archives concerning each part of its territory, then a problem will arise if part of these archives concerns the management of the part of territory transferred but the central archives are an indivisible entity. In such a case, equity will probably demand that the successor State may obtain microfilms or copies of the documents which are necessary for the proper administration of the territory transferred to it.

(b) All the foregoing remarks concern the case of State archives which, *whether or not situated* in the part of territory transferred, have a direct and necessary link with its administration. This means, by and large, State archives of an administrative character. There remains the case of State archives of an *historical or cultural* character. If these historical archives have at all times been situated in the part of territory transferred, there is a strong presumption that they are distinctive and individualized and constitute a homogeneous and autonomous collection of archives directly connected with and forming an integral part of the historic and cultural heritage of the transferred territory. In logic and equity, this property should pass to the successor State even if the predecessor State chose to remove it before transferring the part of territory in question. These items must be returned to their "home ground". If, on the other hand, the State archives concerning the history and culture of the part of territory transferred have never been situated in that

part of the territory, there is an equally strong presumption that they are an integral part of the collection of national historical archives. Logic and equity demand that this indivisible collection should not be tampered with, and that the successor State should have no right in such archives.

138. By a *contrario* reasoning, it follows from the comments above<sup>117</sup> that where the archives are not State archives at all, but are *local* administrative, historical or cultural archives, owned in its own right by the part of territory transferred, they are not affected by these draft articles, for these articles are concerned with State archives. Local archives which are proper to the territory transferred remain the property of that territory, and the predecessor State has no right to remove them on the eve of its withdrawal from the territory or to claim them later from the successor State.

139. These various points may be summed up as follows:

Where a part of a State's territory is transferred by that State to another State,

(a) State archives of every kind having a *direct and necessary link with the administration of the transferred territory* pass to the successor State if they are situated in the transferred territory. If, on the other hand, they form an inseparable part of the national archives on a centralized predecessor State and are kept (as often happens) in its capital, the successor State obtains a *copy* of that part of the archives which concerns the administration of the transferred territory.

(b) State archives of an *historical or cultural* character which relate to the part of territory transferred (principle of connection) and which are kept in that region (principle of origin) pass to the successor State. However, if they have at all times been kept outside the part of territory transferred or if they form part of a collection of archives whose unity must be preserved, they remain the property of the predecessor State.

(c) Whatever their nature or contents, *local* archives proper to the part of territory transferred are not affected by the succession of States.

(d) Because of the *administrative needs* of the successor State, which is responsible for administering the part of territory transferred, and of the predecessor State, which has a duty to protect its interests as well as those of its nationals who have left the part of territory transferred, and secondly, because of the problems of the *indivisibility of certain collections of archives* that constitute an administrative, historical or cultural heritage, the only desirable solution that can be visualized is that the parties should settle an intricate and complex issue *by agreement*. Accordingly, in the settlement of these problems, over all the

solutions put forward, priority should be given to agreement between the predecessor State and the successor State. This agreement should be based on *principles of equity* and should take account of all the special circumstances, particularly of the fact that the part of territory transferred has contributed, financially or otherwise, to the formation and preservation of the archive collections. The principles of equity relied upon should make it possible to take account of various factors, including the requirements of viability of the transferred territory and apportionment according to the shares contributed by the predecessor State and by the territory separated from that State.

140. The substance of the foregoing considerations might be summed up in a draft article reading as follows:

**Article B. Transfer of a part of the territory of one State to another State**

**Where a part of the territory of one State is transferred by that State to another State:**

(1) **The passing of the State archives connected with the administration and history of the territory to which the succession of States relates shall be settled by agreement between the predecessor State and the successor State.**

(2) **In the absence of agreement,**

(a) **The following archives pass to the successor State:**

(i) **archives of every kind belonging to the territory to which the succession of States relates,**

(ii) **the State archives that concern exclusively or principally the territory to which the succession of States relates, if they were constituted in the said territory;**

(b) **The following archives remain with the predecessor State:**

**the State archives concerning exclusively or principally the territory to which the State succession relates, if they were constituted in the territory of the predecessor State.**

(3) **The State to which these State archives pass or with which they remain shall, at the request and at the expense of the other State, make any appropriate reproduction of these State archives.**

**B. Newly independent States**

**1. HISTORICAL BACKGROUND AND NEW PROBLEMS**

141. The problem raised by the claiming and attribution of archives of colonial territories which have become independent is entirely topical. It is bound up with the modern process of decolonization. In the past, the problem was not always given much thought by a colonial Power which ceded or surrendered one of its overseas territories to another colonial

<sup>117</sup> Para. 137.

Power, within the context of the imperial rivalries of the time. Archives, especially those of an administrative nature, remained in the dependent territory and shared its destiny. But it also happened, especially in the case of more important archives, that the colonial Power repatriated the archives, with or without agreement. Thus Spain, having ceded Louisiana to France in 1802, immediately repatriated all the archives and agreed to hand over to France only papers "relating to the limits and demarkation of the territory".<sup>118</sup> However, when France in turn sold Louisiana to the United States, the Franco-American Treaty of 30 April 1803 provided for the handing over of "archives, papers, and documents relating to the lands and to *sovereignty*".<sup>119</sup> The difference is explained by the fact that the former case was one of forcible transfer of territory and the latter a voluntary cession.

142. When the United Kingdom, which had taken possession of the Ionian Islands, authorized those territories to unite with Greece, it transferred all the archives relating to the islands to London.<sup>120</sup> France, for its part, practised at an early stage a particular form of "repatriation" of colonial archives, typical of the French centralizing spirit: a royal edict of 1776 set up the "Depôt des papiers publics des colonies", which was to receive every year, at Versailles, copies of papers of court record-offices, notaries' records, registers of births, marriages and deaths, and so forth.<sup>121</sup>

143. Many examples could be given to illustrate the absence during that period of any rule with regard to the devolution of archives other than that based on the power relationship and on the circumstances specific to each case of enforced surrender or voluntary cession (against payment) of a colonial territory. The same was true of the nineteenth-century cases of the decolonization of the Spanish possessions in the Americas. The new States of Latin America had at their disposal the local administrative archives left behind by Spain, from which they constituted their own collections. But the bulk of the historical collections and documents "of sovereignty" relating to the Spanish conquest is to this day part of the State archives of Spain. The decolonization which followed the Second World War did not substantially change this situation, in the sense that the colonial Powers generally removed and kept archives relating or belonging to the dependent territories left by them. The novel phenomenon which has been observable for the past ten to fifteen years is, however, the ever growing claim by the newly independent States to their archives and the appearance of *archive disputes* between those

young States and their former colonizers. The present period, which might be described as a second stage—that of "decolonization in depth"—has brought a fresh realization, thanks especially to the work of UNESCO, of the need for newly independent States to claim and to recover their *archives as instruments of their development and as an expression of their cultural heritage*. In this sense, it can be said that the present sequels of decolonization are raising the problem of archives in terms of the *right to development, right to information, and right to cultural identity within the framework of the establishment of a new international order* in all spheres.

144. It is becoming more and more imperative that the successor State should receive all archives—historical, administrative, cultural or other—belonging or relating to the hitherto dependent territory, even if they have been removed by the predecessor State. The widest possible implementation of such a principle of succession would greatly help newly independent States to acquire greater mastery of their internal and external problems; a better knowledge of these problems can be gained only through the possession of retired or current archives, which should be left with or returned to the States concerned.

145. Although it seems that there should be no doubt concerning the principle of transfer of archives to the newly independent State, no satisfactory solution has yet been reached in State practice on this question. The principal reason is the former metropolitan country's reluctance to release the archives, but another reason is the diversity of situations: the variety of local conditions, of the preceding status and of the degree of administrative organization left by the colonial Power in the territory.

146. In general it is to be hoped that the formulation of an equitable rule of the transfer of archives to the successor State will lead to better relations between States and open the way for appropriate co-operation in the matter of archives. This would enable the newly independent State to recover *the items which express its history, its traditions, its heritage, and its national genius and provide it with a means of improving the daily life of its inhabitants, and would also help the former colonial Power to ease its own difficulties, intangible and material, which accompany its withdrawal and that of its nationals from the territory which has become independent*. All this, however, gives rise to a number of problems which must now be discussed in relation to different kinds of archives; political archives of the colonial period, pre-colonial historical archives of the territory, administrative archives. All three kinds of archives directly concern the territory which has become independent—but some of these archives, established in the former metropolitan country, were never located in the dependent territory, while others, constituted within the territory, were removed from it on the eve of its independence. We shall therefore examine, succes-

<sup>118</sup> France, *Les archives dans la vie internationale* (op. cit.), pp. 41–42.

<sup>119</sup> *Ibid.*, p. 42.

<sup>120</sup> *Ibid.*

<sup>121</sup> Laroche, *loc. cit.*, pp. 124–125.

sively, the treatment given to political archives of the colonial period, to pre-colonial historical and cultural archives proper to the territory which has become independent, and lastly, to the territory's current administrative archives, giving due attention, wherever necessary, to the sub-distinction between archives remaining in the territory and archives removed from or constituted outside the territory.

## 2. POLITICAL ARCHIVES OF THE COLONIAL PERIOD

147. For obvious reasons, the predecessor State cannot be expected to agree to hand over all archives, especially those linked to its *imperium* over the territory concerned. Many considerations of policy or expediency prevent it from leaving to the new sovereign revealing documents about the colonial administration. For that reason, the principle of the transfer of such archives—which the former metropolitan country is usually careful to remove before independence—is rarely applied in practice.

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

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

... here are apparently legal grounds for distinguishing in the matter of archives between *sovereignty collections and administrative collections*\*: the former, concerning essentially the relations between the metropolitan country and its representatives in the territory, whose competence extended to diplomatic, military and high policy matters, fall within the jurisdiction of the metropolitan country, whose history they directly concern\*.<sup>122</sup>

Another author expresses the same opinion:

Emancipation raises a new problem. The right of new States to possess the archives essential to the defence of their rights, to the fulfilment of their obligations, to the continuity of the administration of the populations, remains unquestionable. But there are other categories of archives kept in a territory, of no immediate practical interest to the successor State, which concern primarily the colonial Power. On closer consideration, such archives are of the same kind as those which, under most circumstances in European history, unquestionably remain the property of the ceding States.<sup>123</sup>

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

151. In the interest of such relations it may perhaps be advisable to avoid argument on the subject of "political" archives or archives "of sovereignty", since they refer to the policy followed by the colonial Power *within* its dependent territory. For example, archives concerning general policy with regard to the territory, or a repressive policy against its liberation movements, are not to be confused with administrative archives or archives concerning the day-to-day management of the territory, but form part of the political archives or archives connected with sovereignty. It is probably unrealistic to expect the predecessor State to hand them over. On the other hand, the part of the political archives or archives connected with sovereignty that is concerned with policy carried on *outside* the territory and on its behalf by the colonial Power (conclusion of treaties applied to the territory, diplomatic documents concerning the relations between the colonial Power and third States with respect to the territory, and in particular diplomatic documents relating to the delimitation of its frontiers), unquestionably concern *also* (and sometimes even *primarily*, in the event of a dispute or conflict with a third State) the newly independent State. The information collected by the Special Rapporteur, which although voluminous is not sufficiently complete to permit the formation of a definitive judgement, seems to show that the problem of returning the archives removed by the former metropolitan country to the new independent State has not yet been solved satisfactorily.

152. It can certainly be said that, no matter how sound and well-founded the principle of the transfer of archives may be, it would be unreasonable to expect the *immediate and complete return* of archives connected with *imperium* and *dominium*. Indeed, in the interest of good relations between the predecessor State and the successor State, it may even be unrealistic and undesirable for the new independent State to claim such archives and to start a dispute over them which is bound to be difficult.

153. *In this, as in other respects, the passage of time is the best remedy.* In almost all countries there exists domestic legislation under which *all political archives, including the most secret ones, become accessible to the public after a certain time.* Colonial political archives form no exception. That being so, if any person is lawfully entitled to consult archives of sovereignty after the lapse of a period of fifteen, twenty or thirty years, why should not the newly independent

<sup>122</sup> France, *Les archives dans la vie internationale* (op. cit.), p. 44.

<sup>123</sup> Laroche, *loc. cit.*, p. 130.

State directly concerned by and interested in archives which relate to its territory have the right to obtain them in microfilm, if need be at its own expense? Thus, even where the archives are connected with the exercise of the colonial Power's imperium over the territory, the successor State's right to obtain copies of such archives after the lapse of time provided for under the predecessor State's legislation for the passage into the public domain of archives connected with sovereignty should be recognized. One can hardly deny to the successor State a right which is granted to any person or institution, public or private, national or foreign.

154. The Special Rapporteur has not found any case of decolonization where the former administering Power has voluntarily left or restored by agreement parts of collections of colonial political archives. France transferred to Viet Nam the archives established by the Imperial Vietnamese Government before the French conquest, together with part of the archives necessary for the administration of the country, but the Franco-Vietnamese agreement of 15 June 1950 concerning the apportionment of the archives of Indo-China under which these transfers took place enabled France to retain all the archives connected with its own diplomatic, military and political sovereignty and which concerned Indo-China, even where such archives had been constituted in Indo-China and were removed at independence. A similar policy appears to have been followed with regard to France's former dependencies in Africa.

155. The problem of colonial political archives was dealt with in the same manner in the case of the independence of Algeria. In the course of frontier disputes with its neighbours occurring after decolonization, Algeria was unable to obtain access to the diplomatic documents and political colonial archives held by France relating to the problem of delimitation of frontiers. A very large part of those colonial political documents had been constituted in Algiers and had remained there until just before the country's independence.<sup>124</sup> The case mentioned was even more

prejudicial in that Algeria was also unable to recover its own historical archives concerning the pre-colonial period, which had been carefully catalogued and even added to by the colonial administration and kept at Algiers but which were removed by the French authorities, as will be seen further on, immediately before Algeria attained independence.<sup>125</sup>

156. It is, however, a most welcome, positive and encouraging development that, in the course of official conversations held in Algiers in March and December 1974, the French Government did not refuse to consider handing over to Algeria originals, microfilms or photocopies, depending on the nature of the document, of historical archives connected with the colonial period. The principle of microfilming archives of sovereignty dating from colonization was accepted in order that each party should have at its disposal all the documents relating to a period during which the histories of France and Algeria were intertwined. The conversations of 1974 were followed by an exchange of diplomatic correspondence on 22 April and 20 May 1975 giving evidence of a constructive approach to the problem by the French authorities, which regarded it as "entirely in conformity with current practice of co-operation among historians to envisage the micro-filming\*" of France's archives of sovereignty concerning the colonization of Algeria.<sup>126</sup>

157. The historical documents of the Netherlands relating to Indonesia formed the subject of negotiations between the former administering Power and the newly independent State within the framework of co-operation in the field of cultural and historical property. The relevant agreement concluded between the two countries in 1976 provides, *inter alia*:

That it is desirable to make cultural objects such as ethnographical and archival\* material available for exhibitions and study in the other country in order to fill the gaps in the already existing collections of cultural objects in both countries, with a view to promoting mutual understanding and appreciation of each other's cultural heritage and history;

colonial personalities, manuscripts, registers later than 1832, collections of Arabic autographs, etc.

More generally, archives in Algeria were classified in three categories: (a) documents antedating 1830 (date of the French colonization), comprising series A to D; (b) documents subsequent to 1830, comprising series E to Y; and (c) Arabic and Turkish archives, combined in series Z.

<sup>125</sup> Cf. paras. 160–161 below.

<sup>126</sup> Letter dated 20 May 1975 addressed by Mr. Sauvagnargues, French Minister of Foreign Affairs, to Mr. Bedjaoui, Ambassador of Algeria in France, in reply to his letter of 22 April 1975. There is no doubt that the French Government, which thus liberally agreed to the microfilming of its political archives of the colonial period concerning Algeria, would be prepared to consent *a fortiori* to Algeria's microfilming French political archives antedating colonization, of which the two noteworthy features are that they concern Algeria and that they do not belong to it. The series in question is series A, known as "Archives of the Consulate of France in Algiers (1686–1831)", which is of importance to the history of Algeria's political and trade relations with France during the two centuries which preceded colonization.

<sup>124</sup> A precise inventory of part of these documents, with the file numbers under which they were catalogued in Algiers, in itself fills a large number of volumes published by the Government-General of Algeria during the colonial period. Cf. G. Esquer and E. Dermenghem, *Archives du Gouvernement général de l'Algérie, série E and EE (Correspondance politique générale), Inventaire sommaire* (Algiers, Heinz, 1949). Series E and EE are known as the "Political boxes". According to Esquer and Dermenghem, the two authors of this "brief inventory", it is "fundamental for the history of the French conquest, the organization and the political and economic life of Algeria in the nineteenth century, especially since the accretion of the Bugeaud and Gueydon collections" (*ibid.*, p. 9). Cf. also Esquer and Dermenghem, *Archives du Gouvernement général de l'Algérie, série H (Affaires musulmanes et sahariennes), Répertoire* (Algiers, Imbert, 1953). This series, according to the authors, is "one of the most important for the history of French penetration in Algeria". Cf. lastly, Esquer and Dermenghem, *Archives du Gouvernement général de l'Algérie, série X (Dons et acquisitions diverses), Répertoire* (Algiers, Imbert, 1954). This series includes papers relating to

*That it should be the general principle that archives ought to be kept by the administration that originated them.\**

Both parties continue to work out programmes and to develop co-operation along the broad lines defined above. In the field of archives, *certain exchanges of microfilms have already been arranged.\**<sup>127</sup>

158. The United Kingdom and Belgium appear to have followed a rather restrictive policy in the matter of colonial political archives, at least so far as the Special Rapporteur is informed at the present stage. Thus, specialists in the problem of "archives of sovereignty" relating to the colonial period summed up the situation at one of the meetings of the Round Table on archives in the following manner: "In all cases the local archives of the territories were handed over, with the exception of papers relating to the sovereignty of the metropolitan country alone."<sup>128</sup> This is true and acceptable, subject to the important double reservation that not all the so-called local archives (including the territory's historical archives) were handed over, and that the "papers of sovereignty"—at least some of them, which were useful to the successor State in defending its territorial rights against third parties—might be reproduced for the successor State's benefit, especially if these documents may lawfully enter the public domain after a certain lapse of time. That is the point of the French solution mentioned above in connection with archives relating to Algeria.

159. The newly independent successor State's access to the political archives of the colonial period must not, then, be definitively and hermetically blocked. Thus, Professor Charles Rousseau has said, very pertinently, in connection with colonial political archives concerning Cambodia: "The problem is posed at present in the relations between France and Cambodia, but so far no final settlement seems to have been reached. *The logical solution would be the return of all items concerning the history of Cambodia during the period in which France assumed international responsibility for its affairs (1863–1953)*".<sup>129</sup>

160. In the Special Rapporteur's opinion, the question of colonial political archives or of archives described as "sovereignty" is particularly important in this type of succession of States, given the frequency with which archives are repatriated by the former metropolitan country. It is most inappropriate and inequitable for the predecessor State to refuse categorically to accede to any justified request by the successor State. *While a century of colonization may form part of the history of the administering Power, it bulks even larger in the history of the newly independent State, which may need certain documents relating to it.* The "Symposium on African archives and

history" held at Dakar from 1 to 8 October 1965 recognized the importance of such documents and therefore made the following recommendation:

Considering the successive disruptions of the political and administrative structures of African countries, the participants hope that wherever transfers have infringed the principles of the *territoriality of archives\** and the *indivisibility of collections,\** the situation will be remedied by restitution or by other appropriate measures.<sup>130</sup>

161. To conclude, *succession to "political archives" or "archives of sovereignty" should not be ruled out altogether.* The diplomatic, military and political documents which were once the expression of the colonial Power's *dominium* and *imperium* over the dependent territory do not concern the former metropolitan country alone. They obviously "relate" to the dependent territory which formed their subject. On acceding to independence, the territory may feel the need to have at its disposal political or diplomatic archives from the colonial period, for example in the case of a dispute concerning the demarcation of its frontier when it has to take a position regarding the problem of its succession to treaties concluded by the colonial Power on behalf of the territory concerned. The reason why newly independent States are notably reluctant to notify their succession to certain treaties is, in some cases, uncertainty as to the reality of the earlier application of those treaties to their territory or as to the actual content of those treaties, of which they find no trace in the archives left behind in the territory by the colonial Power.<sup>131</sup> In the light of these considerations, the Special Rapporteur proposes that the non-restitution of "colonial archives connected with sovereignty" relating to the territory should be strongly qualified by the predecessor State's obligation to hand over to the successor State at least copies of such archives in case of need.<sup>132</sup>

### 3. PRE-COLONIAL HISTORICAL ARCHIVES AND CULTURAL ARCHIVES PROPER TO THE TERRITORY

162. The newly independent State's historical and cultural heritage may include two kinds of archives: archives which antedate colonization, and cultural archives constituted within the dependent territory throughout the duration of the colonial period. If documents of these two kinds have been removed by the former metropolitan country, they must be

<sup>127</sup> A/32/203, pp. 5–6.

<sup>128</sup> France, *Les archives dans la vie internationale* (op. cit.), p. 45.

<sup>129</sup> C. Rousseau, *Cours de droit international public—Les transformations territoriales des Etats et leurs conséquences juridiques* (Paris, Les Cours de droit, 1964–1965), p. 136.

<sup>130</sup> Laroche, *loc. cit.*, p. 139.

<sup>131</sup> Cf. the deliberations of the Commission on the problem of succession of States in respect of treaties, in connection with newly independent States.

<sup>132</sup> Carlo Laroche (who is Chief Curator of the Overseas Section of the French National Archives in Paris) writes:

"It cannot be denied . . . that new States have a *privilege as to the consultation, the communication, and the reproduction of these archives, which, to a large extent, are theirs as well as ours.*" (Laroche, *loc. cit.*, p. 135.)

returned to the successor State. *This principle should be firmly and immediately applied.* These archives are the product of the land and spring from its soil; they are bound up with the land where they came into existence, and they contain its history and form an integral part of its cultural heritage.

163. Historical archives of the pre-colonial period are not "the property of the predecessor State" but are the property of the territory itself, which has constituted them in the course of its history or has acquired them with its own funds or in some other manner. They must consequently revert to the newly independent State, quite apart from any question of succession of States, if they are still within its territory at the time of its accession to independence, or must be claimed by it if they have been removed from the territory by the colonial Power.

164. The reason that the Special Rapporteur has to raise this question is the overlapping which occurs with other categories of archives removed from the territory to which the succession of States relates. Here again, one encounters the difficulties inherent in the mobility of some kinds of property, such as archives, whose improper removal from the territory raises the whole problem of their restitution to the successor State.

165. Where a dispute arises in this field, it tends to continue for a long time without any settlement, and when such a dispute is terminated, it is often by reason of a power relationship. Yet we read in the Proceedings of the Sixth International Conference of the Round Table on Archives that:

It appears undeniable that the metropolitan country should return to States that achieve independence in the first place, *the archives which antedate the colonial regime,\** which are without question the property of the territory. ... It is ... regrettable that the conditions in which the passing of power from one authority to another occurred did not always make it possible to ensure the regularity of this handing over of archives, which may be considered *indispensable*.<sup>133</sup>

166. At this point it is pertinent to cite paragraph 1 of draft article 13 as adopted by the Commission:

When the successor State is a newly independent State;

1. If immovable and movable property, having belonged to an independent State which existed in the territory before the territory became independent, became State property of the

<sup>133</sup> France, *Les archives dans la vie internationale*. (op. cit.), pp. 43-44. The administering Power is not the only party involved. Private persons have also played a part in the looting of archives and cultural property belonging to territories which have become independent. In an article on Madagascar, one author writes:

"The authorities of Antananarivo believe that vast quantities of objects and documents were removed by French scholars or collectors taking advantage of the total absence of controls during the colonial era and the 'Franco-Malagasy' period that followed. In some cases, the drain of cultural property has actually given rise to an illicit trade in precious stones, rare wood and sculpture, *archives,\** etc." (E. Ramaro, "Les lumières et les ombres", *Afrique-Asie*, No. 187 (14-27 May 1979).)

administering State during the period of dependence, it shall pass to the newly independent State.

The provision exactly covers the case of historical archives which antedate colonization. An example is the case of the annexation of Ethiopia by Italy in 1935; Italy was obliged to return the archives which it had removed from Ethiopia when, after the Second World War, its colonization was terminated. Article 37 of the Treaty of Peace of 1947 with Italy provides as follows:

... Italy shall restore all ... archives and objects of historical value belonging to Ethiopia or its nationals and removed from Ethiopia to Italy since October 3, 1935.<sup>134</sup>

167. In the case of Viet Nam, a Franco-Vietnamese agreement in the matter of archives, signed on 15 June 1950, provided that *historical* archives constituted by the Imperial Vietnamese Government before the French occupation were to be restored as of right to the Vietnamese State. The relevant provision of the agreement states:

*Article 7:* The following shall revert to the Government of Viet Nam:

(1) The archives constituted by the Imperial Government and its Kinh Luoc<sup>135</sup>, preserved at the Central Archives.

168. A Franco-Algerian dispute concerning pre-colonial historical archives has been only very partially settled to this day. The archives relating to Algeria's pre-colonial history had been carefully catalogued, added to and preserved in Algiers by the French administering authority until immediately before the independence, when they were taken to France (to Nantes, Paris, and particularly to a special archives depot at Aix-en-Provence). These archives consisted of what is commonly known as the "Arabic collection", the "Turkish collection" and the "Spanish collection". As a result of negotiations between the two Governments, some registers of the pay of Janissaries, forming part of the documents in the Turkish collection, and microfilms of part of the Spanish collection were returned in 1966.

169. By a Franco-Algerian exchange of letters of 23 December 1966, the Algerian Government obtained the restitution of "450 original registers in the Turkish and Arabic languages relating to the administration of Algeria before 1830", that is, before the French colonial occupation. Under the terms of this exchange of letters, by July 1967 the National Library of Algiers was to receive, free of charge, microfilms of documents in Spanish which had been moved from Algeria to Aix-en-Provence immediately before independence and which constituted the "Spanish collection" of Algeria relative to the Spanish occupation of Algerian coastal regions. However, the agreement has not been implemented on this point. The same exchange of letters provided that questions concerning archives not

<sup>134</sup> See footnote 15 above.

<sup>135</sup> The "Kinh Luoc" were governors or prefects of the Emperor of Indo-China before the French occupation of the Indo-Chinese peninsula.



settled by that instrument would form the subject of subsequent consultations.

170. This limited restitution of Algerian historical archives removed by the French administration immediately before Algeria's independence was matched by a contribution by Algeria, for by the same exchange of letters of 23 December 1966 Algeria placed at the disposal of France, in a positive spirit of co-operation, a microfilm of "34 registers in the Turkish and Arabic languages relative to the administration of Algeria before 1830".<sup>136</sup>

171. On the basis of the Franco-Algerian exchange of letters of 23 December 1966, which provided for subsequent consultations between the two countries, Algeria in 1974 again raised the problem of its historical archives. In April 1975, on the occasion of the visit to Algeria of Mr. Valéry Giscard d'Estaing, President of the French Republic, 15 boxes of Algerian historical archives forming part of the "Arabic collection" were returned by the French Government.<sup>137</sup>

172. One last point remains to be examined before we discuss administrative archives: the question of

<sup>136</sup> On the composition of the Algerian historical archives (Turkish and Arabic collections), cf. J. Deny, "A propos du fonds arabe-turc des archives du Gouvernement général de l'Algérie", *Revue africaine* (Algiers, 62nd year, No. 309 (1921), pp. 375-378; Deny, "Les registres de solde des janissaires conservés à la Bibliothèque nationale d'Alger", *ibid.*, 61st year, Nos. 302-303 (1920), p. 19; and *ibid.*, Nos. 304-305 (1920), p. 212; E. Dermenghen, "Les archives centrales du Gouvernement général de l'Algérie", *Documents algériens*, série culturelle, No. 69 (Algiers, 30 May 1953); G. Esquer, "Les sources de l'histoire de l'Algérie": chap. XV of *Histoire et historiens de l'Algérie* (Algiers, Gouvernement général de l'Algérie, Collection du centenaire de l'Algérie, 1931).

<sup>137</sup> When the Algerian side in 1975 again requested the return of the "Arabic collection" and of the remainder of the "Spanish collection", the French side replied that "there do not exist in France any further Algerian archives antedating 1830", the date of colonization, adding that the "Spanish collection" was a collection of copies made by French scholars from the sixteenth to the nineteenth century, on the basis of originals most of which are preserved in the Spanish Archives of Simancas. The French side accordingly referred the Algerian side to the Spanish authorities, with a view to possibly microfilming the originals, while expressing its readiness to authorize the microfilming of copies in its possession (exchange of diplomatic correspondence of 22 April and 20 May 1975). In fact, Algeria's so-called Spanish archives, collected from the sixteenth to the nineteenth century and constituting series C in the classification of Algerian archives (cf. footnote 124 above), are, according to Esquer and Dermenghem, librarian-archivists specializing in the colonial period, "a collection of original items, copies and manuscripts" (*Archives du gouvernement général de l'Algérie, série C* (Algiers, Heinz, n.d.)). The collection contains documents relating to the Arab conquest of Spain and to Spanish establishments on the African coast, to Spanish wars in the seventeenth and eighteenth centuries, and to the history and trade of the Barbary Coast States. It also contains the originals of treaties concluded by the Dey of Algiers with various foreign Powers, as well as manuscripts such as the "Chronicle of Diego Suárez Montañés" (see G. Jacqueton, *Les archives espagnoles du Gouvernement général de l'Algérie, Histoire du fonds et inventaire* (Algiers, 1894)).

historical archives established outside the territory which has become independent.

#### 4. ARCHIVES ESTABLISHED OUTSIDE THE TERRITORY WHICH HAS BECOME INDEPENDENT

173. The Special Rapporteur has not found any specific information covering this field and this type of succession. However, the problem of the ownership of the India Office library furnishes an example of an "unresolved" case. It will be recalled that in 1801 the British East India Company established a library which now contains some 280,000 volumes and 20,000 unpublished manuscripts, constituting the finest treasury of Hinduism in the world. In 1858 this library was transferred to the India Office in Whitehall. After the partition, in 1948, the Commonwealth Relations Office assumed responsibility for the library. On 16 May 1955, the two successor States, India and Pakistan, asked the United Kingdom Government to allow them to divide the library on the basis of the percentages (82.5 per cent for India, 17.5 per cent for Pakistan) used in 1947 for dividing all assets between the two Dominions.<sup>138</sup> The problem would assuredly be quite difficult to solve, because the Government of India Act (1935) had allocated the contents of the library to the Crown. Since the Commonwealth Relations Office could not find a solution, the case was referred in June 1961 to arbitration by three Commonwealth jurists who were members of the Judicial Committee of the Privy Council.<sup>139</sup>

#### 5. ADMINISTRATIVE ARCHIVES

174. The Sixth International Conference of the Round Table on Archives stated:

It seems undeniable that [the former Administering Powers] have ... the duty to hand over all documents which facilitate the continuity of the administrative work and the preservation of the interests of the local populations\* ... Consequently, titles of ownership of the State and of semi-public institutions, documents concerning public buildings, railways, bridges and roads, etc., land survey documents, census records, records of births, marriages and deaths, etc., will normally be handed over with the territory itself. This assumes the regular transfer of local administrative archives to the new authorities. *It is sometimes regrettable that the conditions under which the transfer of powers from one authority to the other occurred have not always been such as to ensure the regularity of this transfer of archives, which may be regarded as indispensable.*\*<sup>140</sup>

<sup>138</sup> In the difficult process of partition between India and Pakistan in 1947, the central archives were left to India, but it was provided that Pakistan would receive a microfilm of the series of common interest.

<sup>139</sup> The Special Rapporteur has taken this information from the lectures of Rousseau, *Les transformations territoriales ...* (*op. cit.*), pp. 137-139. He has not been able to find out whether and how the case was finally settled.

<sup>140</sup> France, *Les archives dans la vie internationale* (*op. cit.*), pp. 43-44.

175. Cases where the former Administering Power has removed all kinds of administrative documents can only be a source of considerable embarrassment, confusion and maladministration for the young independent State which in any case has to cope with often serious difficulties owing to its inexperience and its qualitative and quantitative deficiencies in trained personnel. We will forbear to mention the rare instances where independence was marked by the sudden and brutal rupture of relations between the former motherland and the ex-colony and where, with the accompanying misunderstandings and bitterness, all instruments of administration may have been maliciously destroyed or carried away. More commonly, the removal of the means of administration consisting of archives has mainly reflected the wish of the Administering Power not to be deprived of documents and titles of possible interest to its own nationals who previously formed a minority inhabiting the territory affected by the succession of States. However, reproduction techniques are now so advanced that it would be unreasonable and unjustified to continue to retain administrative or technical archives of this nature, depriving a majority to satisfy a minority's needs—which, in any case, could be satisfied otherwise.

176. In the case of the decolonization of Libya, General Assembly resolution 388A (V) of 15 December 1950, entitled "Economic and financial provisions relating to Libya", expressed the wish of the United Nations that the newly independent State should possess at least the administrative archives most indispensable to current administration. Accordingly, article I, paragraph 2 (a) of the resolution provided for the immediate transfer to Libya of "*the relevant archives and documents of an administrative character or technical value concerning Libya or relating to property the transfer of which is provided for by the present resolution.\**" It will be noticed that, according to this provision, it is immaterial where the archives in question are physically situated (in Libya, Italy or elsewhere) for the purpose of the requirement of their immediate transfer to the new Libyan State, so long as those items "concern" Libya or "relate to" the property which Libya was to receive from the predecessor State. That the newly independent State should have at its disposal the administrative and technical archives for the everyday administration of the country appears to be a matter of common sense and reason, and an imperative condition for the *viability* of this newly independent State.

177. In the case of Eritrea, however, the General Assembly of the United Nations adopted certain provisions of which some are not wholly in accord with those the Organization had one year earlier adopted with regard to Libya. Article II, paragraph 2, of resolution 530 (VI) of 29 January 1952, entitled "Economic and financial provisions relating to Eritrea", had permitted Italy to hand over at its convenience to the provisional Administering Power either the originals or copies of documents and

archives. Under paragraph 3 of the same article, the provisional Administering Power was to restore to Italy not the copies, but possibly the originals of the documents of interest to that country, its nationals, its citizens or any person or persons who had transferred their residence to Italy. It is hard to see how, without the use of scissors, it was possible to hand over to Italy the originals of the records of births in which the names of Italians and Eritreans are juxtaposed through the chronology of birth on Eritrean soil.

178. The same problem arose in 1962 in the case of the independence of Algeria and after the repatriation to France of French nationals born in Algeria. The French Government had decided to remove to France for microfilming certain records of births, marriages and deaths from the town halls of districts in Algeria which had a large European population. This measure would have deprived of their records the Algerian nationals who formed the majority in the country and whose names appeared in the records removed to France just before Algeria's independence. Happily, these records were quickly microfilmed in France and were returned to Algeria several years after independence. The French Government had noted that the records were not all up-to-date because the war of national liberation had prevented the proper maintenance of the records.<sup>141</sup> It then requested the Algerian Government, in 1966, to microfilm the series of records kept in the record offices of the Algerian courts, which were better kept than those in the town halls. The Algerian Government agreed to this request and authorized French microfilm teams to come and do the work themselves.<sup>142</sup>

179. Before drawing his conclusions regarding the problem of archives in the case of the succession of States after decolonization, and before proposing to the Commission a draft article covering this case, the Special Rapporteur wishes to cite some passages from the resolution adopted in October 1977 by the Seventeenth International Round Table Conference on Archives. The resolution does not specifically concern cases of decolonization, but relates to all types of succession of States. It includes in particular the following passages, which should be a guide for the Commission in working out a draft article concerning newly independent States:

... The Round Table reaffirms *the right of each State to recover archives which are part of its heritage of archives\** and which are currently kept outside its territory, as well as *the right of each national group to access,\** under specified conditions, to

<sup>141</sup> During the last years of the war in Algeria, the "marginal notes" were not entered systematically in these records because the notifications of deaths, marriages and divorces were not made by the parties concerned.

<sup>142</sup> The Special Rapporteur, then Minister of Justice, had authorized this microfilming, giving the teams access to all the records of the Algerian courts and permission to work on the spot. The costs of microfilming were borne by the successor State, whose parliament voted special funds for this purpose.

the sources\* wheresoever preserved, concerning its history, and to the copying\* of these sources.

Considering the large number of archival disputes and, in particular, those resulting from decolonization;\*

...

Considering that this settlement should be effected by means of bilateral or plurilateral negotiations;\*

The Round Table recommends that:

(a) The opening of negotiations\* should be encouraged between all the parties concerned, first, regarding the problems relating to the ownership of the archives and, secondly, regarding the right of access and the right to copies;

...

The Round Table recognizes the legitimate right of the public authorities\* and of the citizens of the countries which formed part of larger political units or which were administered by foreign Powers to be informed of their own history. The legitimate right to information exists per se\* independently of the right of ownership in the archives.

...<sup>143</sup>

## 6. PROPOSALS FOR A DRAFT ARTICLE

180. The Special Rapporteur believes that the foregoing discussion may be summed up as follows:

(a) The problem of archives is vital for any territory to which the succession of States relates, but it is assuredly more so for a newly independent State which has to contend, in any case, with difficulties of all kinds resulting from its underdevelopment.

(b) In a newly independent State, the problem of the archives is not to be considered in terms of the facility, which would mean allocating the archives according to their physical location, i.e. to the State holding them at the time when the succession of States occurs. This would put a premium on the removal of the archives on the eve of independence and would legalize *faits accomplis*.

(c) The need for co-operation and the resultant benefits for both the successor State and the predecessor State should be given full consideration in the search for possible solutions to the question of the allocation of archives.

(d) The same needs and the same benefits of co-operation would render incomplete any solution limited to the allocation of any particular kind of archives to the one or the other of the two States, if it were not accompanied, under certain hypothetical conditions envisaged as broadly as possible, by a complementary solution consisting of reproduction for the State to which the originals of the archives were not allocated.

(e) The same needs and the same benefits of co-operation should lead to a search for the most appropriate solutions by direct agreement between the two States concerned, on the basis of equity and with a view to establishing ever closer co-operation between the two countries.

(f) As regards archives proper to the territory to which the succession of States relates:

- (i) Such archives should necessarily revert, in their entirety, and in their original form, to the newly independent State, in conformity with the principles of origin and connection applied by archival scholarship;
- (ii) Archives proper to the territory affected by the succession of States include two classes of items:
  - a. the historical archives antedating the colonization of the territory; and
  - b. archives of a purely administrative or technical nature which were kept in the territory until its independence and which are sometimes referred to as "local archives".
- (iii) The successor State, while not under any legal obligation to do so, might authorize the predecessor State to undertake at its own expense the microfilming of the pre-colonial historical archives, especially if it has added to them during its administration of the territory. As a counterpart to this facility, the successor State should be able to request the predecessor State to microfilm other historical archives of the same kind, which were established and maintained outside the territory that has become independent, which have at all times belonged to the Administering Power and which may usefully supplement the stock of pre-colonial historical archives. This category of archives consists of all items and documents having the triple characteristics of being located on the territory of the former Administering Power, belonging in fact to that Power, but concerning by virtue of their subject matter the history of the territory that has become independent. Thus, while obtaining the restitution of the historical archives belonging to it, the successor State could obtain at its own expense the microfilm of pre-colonial historical archives belonging to the predecessor State, but concerning or relating to the territory which is the object of the succession of States. This would be a source of fruitful co-operation for the two States.
- (iv) On the other hand, the successor State should be legally obliged to allow the predecessor State to reproduce, at its own expense, all or part of certain kinds of administrative or technical archives which it may need, particularly for administrative procedures concerning the nationals of the predecessor State who used to live in the territory affected by the succession of States and who, on independence, chose to settle in the territory of the predecessor State. Clearly, however, the successor State would be legally obliged to supply only copies of the administrative and other documents used in everyday administration, and even then the delivery of such items should not compromise its security, interests or sovereignty. If, for instance, the predecessor State were to claim the purely technical dossier of a military base which it had constructed on the

<sup>143</sup> International Council on Archives, *Bulletin*, No. 9 (December 1977), p. 7.

territory that has become independent, or a dossier containing the criminal record of one of the nationals of the predecessor State who used to live in the administered territory, the newly independent State could refuse to supply copies of such items. In such cases, the successor State, like any other State, must have some latitude and discretion.

- (g) (i) As regards the "sovereignty archives" connected with the *imperium* of the Administering Power in the territory that has become independent, the rule is that they should be allocated to the predecessor State. However, *considerations of co-operation may, and indeed should, cause that State to adopt an understanding attitude towards the problems that may arise for the successor State*. If the latter should find itself in dispute or litigation with a third State concerning the delimitation of its frontiers, the former Administering Power should supply to the successor State, at its expense if need be, microfilms of all documents which it may need to present its case, or which throw light on that of the third State, or which may enlighten an international organization or any judicial or arbitral body.
- (ii) This possibility open to the newly independent State of gaining access to the colonial archives of sovereignty becomes even more imperative if, after a certain time and in accordance with the laws of the predecessor State, these archives of sovereignty are opened to the public.
- (iii) Naturally, the predecessor State will legitimately refuse to surrender any document of which the communication to the newly independent State might compromise the security or the interests of the predecessor State.
- (h) (i) All these points, which seem to the Special Rapporteur to be a fair summary of the complex situation created, as regards archives, by succession after decolonization, take account of the concerns of the newly independent States without ignoring the interests, or merely fears, of the former Administering Powers, while also conforming both to the objectives of co-operation and to the concerns of the international organizations and specialized conferences that deal with these matters.
- (ii) Mention should be made at this point of the *Symposium on African archives and history*, held at Dakar from 1 to 8 October 1965, which recommended that in view of the "successive disruptions of the political and administrative structures of African countries, ... wherever transfers [of archives to the former metropolitan country] have infringed the principles of the territoriality of archives and the indivisibility of collections, the situation will be remedied by restitution or by other appropriate measures".<sup>144</sup>

<sup>144</sup> See para. 160 above.

- (iii) *UNESCO* has also taken action in this field. Its resolutions have been referred to earlier. Its action seems extremely beneficial in that it constitutes a timely intervention by an international organization which is concerned more than any other with the preservation of historical and cultural heritage and is free of any preoccupation with national pride that would cloud judgement on these already complex issues.<sup>145</sup>
- (iv) Lastly, the *Cartographic Seminar of African countries and France* has adopted a recommendation in which it welcomed the statement by the Director of the National Geographic Institute on the *recognition of State sovereignty over all cartographic archives* and proposed that such archives should be transferred to States on request, while documents relating to frontiers would be handed over simultaneously to the States concerned.<sup>146</sup>

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

#### **Article C. Newly independent States**

**1. Where the successor State is a newly independent State:**

**(a) archives of all kinds which belonged to the territory prior to its dependence and which became the archives of the administering State, and**

**(b) administrative and technical archives connected with the activity of the predecessor State in regard to the territory to which the State succession relates, shall pass to the successor State.**

**2. The successor State shall undertake, for the purposes of the predecessor State, and at the latter's request and expense, any necessary reproduction of the archives that pass to it.**

**3. Succession to archives other than those referred to in paragraph 1 and concerning the territory to which the State succession relates shall be determined by agreement between the predecessor State and the successor State in such a manner that each of the two States benefits liberally and equitably from such archives.**

**4. Where a newly independent State is formed from two or more dependent territories, the passing of the archives of the predecessor States to the newly independent State shall be determined in accordance with the provisions of paragraphs 1 to 3 above.**

**5. Where a dependent territory becomes part of the territory of a State other than the State which was responsible for its international relations, the passing of**

<sup>145</sup> See paras. 41 to 53 above, and also para. 54, on action by the United Nations.

<sup>146</sup> Cartographic Seminar of African countries and France, Paris, 21 May–3 June 1975, *General Report*, recommendation No. 2, "Basic cartography".

the archives of the predecessor State to the successor State shall be determined in accordance with the provisions of paragraphs 1 to 3 above.

6. Agreements concluded between the predecessor State and the successor State in regard to archives shall not infringe the right of every people to information about its history and cultural heritage.

### C. Uniting of States

182. The Commission has provisionally adopted a draft article 14 on the passing of State property to the successor State in the event of a uniting of States. The text reads as follows:

[1. When two or more States unite and thus form a successor State, the State property of the predecessor States shall, subject to paragraph 2, pass to the successor State.

2. The allocation of the State property of the predecessor States as belonging to the successor State or, as the case may be, to its component parts, shall be governed by the internal law of the successor State.]

183. The agreement of the parties has a decisive place in the matter of State succession, but nowhere is it more decisive than in the case of a uniting of States. Union consists essentially and basically of a *voluntary act*. In other words, it is the agreement of the parties which settles the problems arising from the union. Even where the States did not, before uniting, reach agreement on a solution in a given field—for example, archives—such omission or silence may be interpreted without any risk of mistake, as the common will to rely on the future provisions of internal law to be enacted instead by the successor State for the purpose after the uniting of States has become a reality. Thus, if the agreement fails to determine what is to become of the predecessor State's archives, internal law prevails.

184. It is the law in force in each component State at the time of the uniting of States that initially prevails. Obviously, however, pending the uniting, such law can only give expression to the component State's sovereignty over its own archives. Consequently, in the absence of an agreed term in the agreements concerning the union, the archives of each component State do not pass automatically to the successor State, because the internal law of the component State has not been repealed. *Only if the successor State adopts new legislation repealing the component parts' internal laws in the matter of archives are those archives transferred to the successor State.*

185. The solution depends on the *constitutional nature of the uniting of States*. If the union results in the creation of a federation of States, it is difficult to see why the archives of each component State which survives (although with reduced international competence) should pass to the successor State. If, on the other hand, the uniting of States results in the establishment of a unitary State, the constituent States cease to exist completely, and their State archives can

only pass to the successor State, at least in international law.

186. The solution depends also on the *nature of the archives*. If they are historical in character, the archives of the predecessor State are of interest to it alone and of relatively little concern to the union, unless it is decided by treaty, for reasons of prestige or other reasons, to transfer them to the seat of the union or to declare them to be its property. Any change of status or application, particularly a transfer to the benefit of the successor State of other categories of archives needed for the direct administration of each constituent State, would be not only unnecessary for the union but highly prejudicial for the administration of the States forming the union.

187. Referring to the case of a uniting of States leading to a federation, Fauchille has said:

The State which ceases to exist does so not as a State but only as a unitary State. It should therefore retain its own patrimony, for the existence of this patrimony is in no way incompatible with the new régime to which the State is subject. Although its original independence is lost, its legal personality remains, and there is no reason why its property should become the property of the federation or union.<sup>147</sup>

Professor Erik Castrén shares that opinion: "Since the members of the union of States retain their statehood, their public property continues as a matter of course to belong to them."<sup>148</sup> Thus, both international treaty instruments and instruments of internal law, such as constitutions or basic laws, effect and define the uniting of States, stating the degree of integration. It is on the basis of these various expressions of will that the devolution of State archives must be determined.

188. Once States agree to constitute a union among themselves, it must be presumed that they intend to provide it with the means necessary for its functioning and viability. Thus, State property, particularly archives, pass to the successor State only if they are found to be necessary for the exercise of the powers devolving upon that State under the constituent act of the union. The transfer of the archives of the constituent States does not, however, seem to be necessary to the union, which will in time establish its own archives. The archives of the constituent States will continue to be more useful to those States than to the union itself for the reasons already given.<sup>149</sup> In this connection, an old but significant example may be recalled, that of the *unification of Spain* during the fifteenth and sixteenth centuries. That union was effected in such a way that the individual kingdoms received varying degrees of autonomy, embodied in appropriate organs such as councils and viceroalties. Consequently, there was no centralization of archives.

<sup>147</sup> Fauchille, *op. cit.*, p. 390, para. 233.

<sup>148</sup> E. Castrén, "Aspects récents de la succession d'Etats", *Recueil des cours de l'Académie de droit international de la Haye, 1951-I* (Paris, Sirey, 1952), vol. 18, p. 454.

<sup>149</sup> See para. 186 above.

The present organization of Spanish archives is still profoundly influenced by that system.

189. The Special Rapporteur cannot do better than propose a draft article modelled on article 14 relating to succession to State property. The article might read:

**Article D. Uniting of States**

**1. Where two or more States unite and thus form a successor State, the State archives of the predecessor States shall, subject to the provisions of paragraph 2, pass to the successor State.**

**2. The allocation of the State archives of the predecessor States as belonging to the successor State or, as the case may be, to its component parts, shall be governed by the internal law of the successor State.**

**D. Separation of part or parts of the territory of a State and dissolution of a State**

190. The case of separation of a part or parts of the territory of a State and the case of dissolution of a State are dealt with in separate draft articles, with respect both to State property and State debts, but the commentaries on the two articles are combined. Separation and dissolution both concern cases where a part or parts of the territory of a State separate from that State to form one or more individual States. The case of separation, however, is associated with that of secession, in which the predecessor State continues to exist, whereas in the case of dissolution the predecessor State ceases to exist altogether.

191. An important and multiple dispute concerning archives arose among Scandinavian countries, particularly at the time of the dissolution of the Union between Norway and Sweden in 1905 and of the Union between Denmark and Iceland in 1944. In the first case, it seems, first, that both countries, Norway and Sweden, retained their respective archives, which the Union had not merged, and, secondly, that it was eventually possible to apportion the central archives between the two countries, but not without great difficulty. In general, the principle of functional connection was combined with that of territorial origin in an attempt to reach a satisfactory result. The convention of 27 April 1906 concluded between Sweden and Norway one year after the dissolution of the Union settled the allocation of common archives held abroad. That convention, which settled the problem of the archives of consulates that were the common property of both States, provided that:

... Documents relating exclusively to Norwegian affairs; and compilations of Norwegian laws and other Norwegian publications, shall be handed over to the Norwegian diplomatic agent accredited to the country concerned.<sup>150</sup>

Later, pursuant to a protocol of agreement between the two countries dated 25 April 1952, Norway succeeded in having Sweden transfer certain central archives which had been common archives.

192. A general arbitration convention concluded on 15 October 1927 between Denmark and Iceland resulted in a reciprocal handing over of archives. When the Union between Denmark and Iceland was dissolved, the archives were apportioned haphazardly. There was however, one problem which was to hold the attention of both countries, to the extent that *public opinion in Iceland and Denmark was aroused, something rarely observed in disputes relating to archives*. What was at stake was an important collection of parchments and manuscripts of great historical and cultural value containing, *inter alia*, old Icelandic legends and the "Flatey Book", a two-volume manuscript written in the fourteenth century by two monks on the island of Flatey in Iceland, and tracing the history of the kingdoms of Norway. The parchments and manuscripts were not really State archives since they had been collected in *Denmark* by an *Icelander*, Arne Magnussens, who was Professor of History at the University of Copenhagen. He had saved them from destruction in Iceland, where they were said to have been used on occasion to block up holes in the doors and windows in the houses of Icelandic fishermen.

193. These parchments, whose value had been estimated at 600 million Swiss francs, had been duly bequeathed in perpetuity by their owner to a university foundation in Copenhagen. Of Arne Magnussens's 2,855 manuscripts and parchments, 500 had been restored to Iceland after the death of their owner and the rest were kept by the foundation which bears his name. Despite the fact that they were private property, duly bequeathed to an educational establishment, these archives were finally handed over in 1971 to the Icelandic Government, which had been claiming them since the end of the Union between Denmark and Iceland, as the local governments which preceded them had been doing since the beginning of the century. This definitive restitution occurred pursuant to Danish judicial decisions. The Arne Magnussens university foundation of Copenhagen, to which the archives had been bequeathed by their owner, had challenged the Danish Government's decision to hand over the documents to Iceland, instituting proceedings against the Danish Minister of National Education in the Court of Copenhagen. The Court ruled in favour of the restitution of the archives by an order of 17 November 1966.<sup>151</sup> The foundation having appealed against this ruling, the Danish Supreme Court upheld the ruling by its decision of 18 March 1971.<sup>152</sup> Both Governments

<sup>151</sup> *Revue générale de droit international public* (Paris), 3rd series, vol. XXXVIII, No. 2 (April-June 1967), pp. 401-402.

<sup>152</sup> The Special Rapporteur obtained the text of this decision, in Danish, thanks to the kindness of our late colleague on the

<sup>150</sup> Baron Descamps and L. Renault, *Recueil international des traités du XXe siècle, 1906* (Paris, Rousseau), p. 1050.

had agreed on the restitution of the originals to Iceland,<sup>153</sup> which was to house them in a foundation similar to and having the same objects as those set forth in the statutes of the Copenhagen Arne Magnussens Foundation. They also agreed on the conditions governing the loan, reproduction and consultation of these archives in the interest of scholarly research and cultural development. The agreement reached ended a long and bitter controversy between the Danes and the Icelanders, who both felt strongly about this collection, which is of the greatest cultural and historical value to them. On 21 April 1971 the Danish authorities returned the Flatey Book and other documents; over the next 25 years the entire collection of documents will join the collection of Icelandic manuscripts at the Reykjavik Institute. At the time of the official handing-over ceremony, when the first documents left the Royal library at Copenhagen, the Library flew the flag at half-mast.<sup>154</sup>

194. In the event of dissolution of a State, each of the successor States receives the archives relating to its territory. The central archives of the dissolved State are apportioned between the successor States if they are divisible, or placed in the charge of the successor State they concern most directly if they are indivisible. Copies are generally made for any other successor State concerned.

195. The disappearance of the Austro-Hungarian monarchy after the First World War gave rise to a very vast and complicated dispute concerning archives which has not yet been completely settled. The territories which were detached from the Austro-Hungarian Empire to form new States, such as Czechoslovakia after the First World War, arranged for the archives concerning them to be handed over to them.<sup>155</sup> The treaty concluded on 10 August 1920 between Czechoslovakia, Italy, Poland, Romania and the Serb-Croat-Slovene State at Sèvres provides as follows in article 1:

Allied States to which territory of the former Austro-Hungarian monarchy has been or will be transferred, or which were established as a result of the dismemberment of that monarchy\*,

undertake to restore to each other any of the following objects which may be in their respective territories:

1. Archives, registers, plans, title-deeds and documents of every kind of the civil, military, financial, judicial or other administrations of the transferred territories ....<sup>156</sup>

196. The earlier Treaty of Saint-Germain-en-Laye (10 September 1919) between the Allied Powers and Austria contained many provisions obliging Austria to hand over archives to various new (or pre-constituted) States.<sup>157</sup> A convention concluded between Austria and various States attempted to settle the difficulties which had arisen as a result of the implementation of the provisions of the Treaty of Saint-Germain-en-Laye in the matter of archives.<sup>158</sup> It provided, *inter alia*, for exchanges of copies of documents, for the allocation to successor States of various archives relating to industrial property, and for the establishment of a list of reciprocal claims. An agreement of 14 October 1922 concluded at Vienna between Czechoslovakia and Romania<sup>159</sup> provided for a reciprocal handing over of archives inherited from the Austro-Hungarian monarchy by each of the two States and concerning the other State. On 26 June 1923, a convention concluded between Austria and the Kingdom of the Serbs, Croats and Slovenes,<sup>160</sup> pursuant to the pertinent provisions of the Treaty of Saint-Germain-en-Laye, provided for the handing over by Austria to the Kingdom of archives concerning the Kingdom. A start was made with the implementation of this convention. On 24 November 1923, it was Romania's turn to conclude a convention with the Kingdom of the Serbs, Croats and Slovenes, which was signed at Belgrade, for the reciprocal handing-over of archives. Similarly, the convention concluded between Hungary and Romania at Bucharest on 16 April 1924 with a view to the reciprocal handing-over of archives<sup>161</sup> settled, so far as the two signatory countries were concerned, the terrible dispute concerning archives which had resulted from the dissolution of the Austro-Hungarian monarchy. That same year the same two countries, Hungary and Romania, signed another convention, also in Bucharest, providing for exchanges of administrative archives.<sup>162</sup> A treaty of

(Footnote 152 continued.)

Commission, Edvard Hambro. He also wishes to thank the Danish Embassy in Paris for having translated the text. Cf. Danish text Højesteretsdomme, 18 marts 1971, i sag 68/1970, *Arne Magnussens Legat (Den arnamagnaeanske Stiftelse, mod Undervisningsministeriet)* (Supreme Court decisions, 18 March 1971, Case No. 68/1970, Arne Magnussens Bequest ("Arnamagnæ" Foundation, v. Ministry of National Education)) in *Ugeskrift for Retsvaesen* (Copenhagen), No. 19 (8 May 1977), pp. 299-305.

<sup>153</sup> Cf. also J.H.W. Verzijl, *International Law in Historical Perspective* (Leyden, Sijthoff, 1974), vol. VII, p. 153, which mentions the case of the Icelandic parchments.

<sup>154</sup> A.E. Pederson, "Scandinavian sagas sail back to Iceland", *International Herald Tribune*, 23 April 1971, p. 16.

<sup>155</sup> Article 93 of the Treaty of Saint-Germain-en-Laye (G.F. de Martens, ed., *Nouveau Recueil général de traités* (Leipzig, Weicher, 1923), 3rd series, vol. XI, p. 715).

<sup>156</sup> *Ibid.* (1924), vol. XIX, pp. 810-811.

<sup>157</sup> Cf. arts. 93, 97, 192, 193, 194, 196, 249 and 250 of the Treaty of Saint-Germain-en-Laye (*ibid.* (1923), vol. XI, pp. 715 *et seq.*)

<sup>158</sup> Cf. arts. 1-6 of the Convention concluded 6 April 1922 between Austria, Czechoslovakia, Hungary, Italy, Poland, Romania and the Kingdom of the Serbs, Croats and Slovenes (Italy, Ministero degli affari esteri, *Trattati e Convenzioni fra il Regno d'Italia e gli Altri Stati* (Rome, 1931), vol. 28, pp. 361-370).

<sup>159</sup> League of Nations, *Treaty Series*, vol. XXV, p. 163.

<sup>160</sup> Kingdom of the Serbs, Croats and Slovenes, *Sluzbene Novine* [Official Journal] (Belgrade), 6th year, No. 54-VII (7 March 1924), p. 1.

<sup>161</sup> League of Nations, *Treaty Series*, vol. XLV, p. 331.

<sup>162</sup> Cf. arts. 1 (para. 5) and 18 of the convention signed at Bucharest on 3 December 1924 for an exchange of papers relating to judicial proceedings, land, registers of births, marriages and deaths.

conciliation and arbitration, dated 23 April 1925, was concluded between Czechoslovakia and Poland<sup>163</sup> for a reciprocal handing over of archives inherited from the Austro-Hungarian monarchy.

197. Yugoslavia and Czechoslovakia subsequently obtained from Hungary, after the Second World War, by the Treaty of Peace of 10 February 1947, *all historical archives which had been constituted by the Austro-Hungarian monarchy between 1848 and 1919 in those territories*. Under the same treaty, Yugoslavia was also to receive from Hungary the archives concerning Illyria, which dated from the eighteenth century.<sup>164</sup> Article 11, paragraph 1, of the same treaty specifically states that the detached territories which had formed States (Yugoslavia, Czechoslovakia) were entitled to the objects "constituting [their] cultural heritage ... which originated in those territories\*"; thus, the article was based on the link existing between archives and territory. Paragraph 2 of the same article, moreover, rightly stipulates that Czechoslovakia would not be entitled to archives or objects "acquired by purchase, gift or legacy, and original works of Hungarians"; by a *contrario* reasoning it follows, presumably, that objects acquired by the Czechoslovak territory should revert to it. In fact, these objects have been returned to Czechoslovakia.<sup>165</sup>

198. The aforementioned article 11 of the Treaty of Peace with Hungary is one of the most specific with regard to time-limits for the handing over of archives; it establishes a veritable time-table within a maximum time-limit of 18 months.

199. This simple enumeration of only some of the many agreements reached on the subject of archives upon the dismemberment of the Austro-Hungarian Empire gives some idea of the complexity of the problem to be solved in the matter of the Austro-Hungarian imperial archives. Certain archival disputes that arose in this connection concern the succession of States by "transfer of part of the territory of a State to another State" which was discussed in the Special Rapporteur's earlier reports on this type of succession. Other disputes, also resulting from the dissolution of the Austro-Hungarian monarchy, concerned the "separation of one or more parts of the territory of a State" to form a new State and the dissolution of a State resulting in two or more new States. The archival dispute caused by the disappearance of the Hapsburg monarchy has given rise to intricate, even inextricable, situations and cross-claims in which each type of succession of States cannot always easily be separated.<sup>166</sup>

<sup>163</sup> League of Nations, *Treaty Series*, vol. XLVIII, p. 383.

<sup>164</sup> Art. 11 of the Treaty of Peace with Hungary (United Nations, *Treaty Series*, vol. 41, p. 178).

<sup>165</sup> The provisions of the same art. 11 (para. 2) were reproduced for the case of Yugoslavia.

<sup>166</sup> See, in addition to the agreements mentioned in the preceding paragraphs, the Convention of Nettuno (20 July 1925)

200. The convention concluded on 25 May 1926 at Baden between the two States, Austria and Hungary, which had given the Austro-Hungarian monarchy its name, had partly settled the Austro-Hungarian archival dispute. Austria handed over the "Registraturen", *documents of a historical nature concerning Hungary*. The archives of common interest, however, formed the subject of special provisions, pursuant to which a permanent mission of Hungarian archivists is working in Austrian State archives, has free access to the shelves and participates in the sorting of the common heritage. (The most difficult question concerning local archives related to the devolution of the archives of the two counties of Sopron (Ödenburg) and Vas (Eisenburg), which, having been transferred to Austria, formed the Burgenland, while their chief towns remained Hungarian. It was decided to leave their archives, which had remained in the chief towns, to Hungary, except for the archives of Eisenstadt and various villages, which were handed over to Austria. This solution was later supplemented by a convention permitting annual exchanges of microfilms in order not to disappoint any party.)<sup>167</sup>

201. The case of the break-up of the Ottoman Empire after the First World War is similar to that of a *separation* of several parts of a State's territory, although the Turkish Government upheld the theory of the *dissolution* of a State when, during negotiation of the treaty signed at Lausanne in 1923, it considered the new Turkish State as a successor State on the same footing as the other States which had succeeded to the Ottoman Empire. The Special Rapporteur will not enter into this controversy, which simply adds a justification for the joint commentaries on the cases of separation and dissolution. The following provision appears in the Treaty of Lausanne:

*Article 139*

Archives, registers, plans, title-deeds and other documents of every kind relating to the civil, judicial or financial administration, or the administration of Wakfs, which are at present in Turkey and are *only of interest\** to the Government of a territory detached from the Ottoman Empire, and reciprocally those in a territory detached from the Ottoman Empire which are *only of interest\** to the Turkish Government shall reciprocally be restored.

Archives, registers, plans, title-deeds and other documents mentioned above which are considered by the Government in whose possession they are as being *also of interest\** to itself, may

between Italy and the Kingdom of the Serbs, Croats and Slovenes (arts. 1-15); the convention of 26 October 1927 concluded between Czechoslovakia and Poland for the handing over of archives inherited from the Austro-Hungarian monarchy and concerning each of the two contracting States; the Convention of Rome (23 May 1931) concluded between Czechoslovakia and Italy for the apportionment and reproduction of archives of the former Austro-Hungarian army (arts. 1-9); the Agreement of Vienna (26 October 1932) which enabled Poland to obtain various archives from Austria; the Convention of Belgrade (30 January 1933) between Romania and Yugoslavia; etc.

<sup>167</sup> Cf. the statements by Mr. Szedö at the Sixth International Conference of the Archives Round Table (France, *Les archives dans la vie internationale* (*op. cit.*), p. 137).



be retained by that Government, subject to its furnishing on request photographs or certified copies to the Government concerned.

Archives, registers, plans, title-deeds and other documents which have been taken away either from Turkey or from detached territories shall reciprocally be restored in original, in so far as they *concern exclusively*\* the territories from which they have been taken.

The expense entailed by these operations shall be paid by the Government applying therefore.

...<sup>168</sup>

202. Without expressing an opinion on the exact juridical nature of the operation of the dissolution of the Third German Reich and the creation of the two Germanies, a brief reference will here be made to the controversies that arose concerning the Prussian Library. Difficulties having arisen with regard to the allocation of this large library, which contains 1,700,000 volumes and various Prussian archives, an Act of the Federal Republic of Germany dated 25 July 1957 placed it in the charge of a special body, the "Foundation for the Ownership of Prussian Cultural Property". This legislative decision is at present being contested by the German Democratic Republic.

203. Pressed for time and somewhat awed by the length of this report, the Special Rapporteur does not intend to delve further into the question of the disposition of archives in cases of separation of a part or parts of the territory of a State and of the dissolution of a State.

204. As regards the case of separation of part or parts of the territory of a State, the Special Rapporteur draws attention to draft *article 15* adopted by the Commission, concerning succession to State property. It reads as follows:

1. When a part or parts of the territory of a State separate from that State and form a State, and unless the predecessor State and the successor State otherwise agree:

(a) immovable State property of the predecessor State shall pass to the successor State in the territory of which it is situated;

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

(c) movable State property of the predecessor State other than that mentioned in sub-paragraph (b) shall pass to the successor State in an equitable proportion.

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

3. Paragraphs 1 and 2 are without prejudice to any question of equitable compensation that may arise as a result of a succession of States.

The Special Rapporteur proposes, on this basis, a draft article E which would read:

**Article E. Separation of part or parts of the territory of a State**

1. Where a part or parts of the territory of a State separate from that State and form a State, the transfer of the State archives of the predecessor State to the successor State shall be settled by agreement between the predecessor State and the successor State.

2. In the absence of an agreement:

(a) the State archives of the predecessor State connected with the activity of the predecessor State in respect of the territory to which the succession of States relates pass to the successor State;

(b) the State archives of the predecessor State other than those referred to in paragraph 2(a) above pass to the successor State in an equitable proportion.

3. Each of the two States shall, for the use of the other State and at its request, make an appropriate reproduction of the State archives which it has retained or which have passed to it, as the case may be.

4. The provisions of paragraphs 2 and 3 above are without prejudice to any question of equitable compensation that may arise as a result of a succession of States.

5. The provisions of paragraphs 1 to 4 above apply where a part of the territory of a State separates from that State and unites with another State.

205. It will be noted that the Special Rapporteur has given special prominence to the agreement between the parties as a means of settling disputes concerning archives. Nothing can be done in this respect unless the two parties get together with a view to negotiating and settling such a dispute.

206. With regard to the case of the dissolution of a State, the Special Rapporteur cites below draft *article 16*, adopted by the Commission, in respect of succession to State property.

1. When a predecessor State dissolves and disappears and the parts of its territory form two or more States, and unless the successor States concerned otherwise agree:

(a) immovable State property of the predecessor State shall pass to the successor State in the territory of which it is situated;

(b) immovable State property of the predecessor State situated outside its territory shall pass to one of the successor States, the other successor States being equitably compensated;

(c) movable State property of the predecessor State connected with the activity of the predecessor State in respect of the territories to which the succession of States relates shall pass to the successor State concerned;

(d) movable State property of the predecessor State other than that mentioned in sub-paragraph (c) shall pass to the successor States in an equitable proportion.

2. Paragraph 1 is without prejudice to any question of equitable compensation that may arise as a result of a succession of States.

On this basis, the Special Rapporteur proposes the following draft article F:

<sup>168</sup> Treaty of Peace between the British Empire, France, Italy, Japan, Greece, Rumania, the Serbo-Croat-Slovene State of the one part, and Turkey of the other part, signed at Lausanne on 24 July 1923 (League of Nations, *Treaty Series*, vol. XXVIII, p. 109).

### Article F. Dissolution of a State

1. If a predecessor State dissolves and disappears and the parts of its territory form two or more States, the transfer of the State archives to the different successor States shall be settled by agreement between them.

2. In the absence of an agreement:

(a) the State archives of all kinds of the predecessor State, wheresoever they may be, pass to the successor State if they relate exclusively or principally to the territory of that successor State, which shall be responsible for making an appropriate reproduction thereof for the use of the other successor States, and at their request and expense.

(b) State archives which are indivisible or which relate equally to the territories of two or more successor States pass to the successor State in whose territory they are situated, the other successor States concerned being equitably compensated, and the successor State to which they pass shall be responsible for making an appropriate reproduction thereof for the use of the other successor State concerned and at their request.

(c) State archives of the type referred to in paragraph (b) above which are kept outside the territory of the dissolved predecessor State pass to one of the successor States concerned according to the conditions laid down in paragraph (b).

207. As in draft article E, the Special Rapporteur has given prominence to the settlement of disputes concerning archives by agreement between the parties. Wishing to propose an equitable solution for the case where there is no agreement, the Special Rapporteur has relied heavily on the principle of the functional connection by recommending that State archives should pass to the successor State if they concern exclusively or principally that State's territory. It is relatively immaterial whether these archives are situated in the territory of one of the successor States, or even outside the territorial boundaries of the dissolved State (for example, archives of the embassies of the predecessor State, its consulates, its trade missions, its military missions, and its representatives to intergovernmental organizations). This is the purpose of paragraph 2(a).

208. Paragraph (b) concerns the case of State archives which are indivisible or which relate to much the same extent to two or more successor States. The solution proposed involves transferring them to the successor State in whose territory they are physically present. The problem arises in the case of the *central archives* of the State which has disappeared. Its capital, in which such archives are generally kept, forms part of the territory of one of the successor States. It is this State which will inherit the central archives that are indivisible, or that are of equal interest to all the other successor States. The conditions laid down for such a transfer in paragraph (b)

provide for equitable compensation, which may be financial, archivist, movable or immovable, and which moreover do not preclude the right to any substitute copy.

209. Finally, in cases where such indivisible archives, or archives concerning two or more successor States, are not situated in the territory of any of the successor States (archives of official representatives of the dissolved State abroad), they are allocated to one of the successor States concerned under the conditions laid down in paragraph 2(c).

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